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CASES ARGUED AND DETERMINED

IN THE

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SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

FEBRUARY 1901 — MAY 1901

HENRY WALTON SWIFT

REPORTER

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JUSTICES
OF THE
SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. OLIVER WENDELL HOLMES, CHIEF JUSTICE.

HON. MARCUS PERRIN KNOWLTON.

HON. JAMES MADISON MORTON.

HON. JOHN LATHROP.

HON. JAMES MADISON BARKER.

HON. JOHN WILKES HAMMOND.

HON. WILLIAM CALEB LORING.

ATTORNEY GENERAL.

HON. HOSEA MORRILL KNOWLTON.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

JOHN S. ELDRED *vs.* ALBERT H. MACKIE & another.
JOSEPH GOODSPEED *vs.* SAME.

Plymouth. October 16, 1900. — February 27, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & HAMMOND, JJ.

Directions by a contractor for the construction of a building, to a sub-contractor, who has agreed to do the brick work, to hurry up the work and to make certain changes not required by the sub-contract, do not create the relation of master and servant, such directions being incident to the relation of contractor and contractee.

One, to whom a contract for the brick work of a building is sublet by the contractor for the whole building and who is injured by the falling upon him of a floor insufficiently supported, cannot recover from the contractor for such injuries under a declaration alleging that he was employed by the defendant and put to work by him in an unsafe and dangerous place.

TWO ACTIONS OF TORT for personal injuries to the plaintiffs while in the defendants' employ by the falling of the third floor of a brick school building in process of erection by the defendants under a contract with the city of Brockton. Writ dated October 18, 1899.

The declaration in each of the two cases was as follows:

"And the plaintiff says he was employed by the defendants as a bricklayer on a building known as the Howard School; that it was the duty of the defendants to furnish the plaintiff with a safe and suitable place in which to perform his work, but that the defendants wholly regardless of their duty negligently and carelessly put the plaintiff to work in an unsafe and dangerous place, namely, under a flooring which was heavily loaded with boards and lumber, and improperly supported, that the defendants knew or in the exercise of reasonable care might have known, that the place where the plaintiff was at work was unsafe and dangerous, and that the plaintiff was ignorant of the fact that said place was so unsafe and dangerous, and while in the exercise of reasonable care in every respect, the plaintiff was severely injured by the falling of the flooring and timbers upon his head and body. And the plaintiff says that he was injured solely by reason of the negligence of the defendants in carelessly and improperly loading said flooring and unsafely, imperfectly, and carelessly supporting said flooring under which the plaintiff had been placed at work."

The two cases were tried together, before *Mason, C. J.*, and the following facts equally applicable to each appeared:

The written contract between the plaintiffs and the defendants provided that the plaintiffs with two other masons should perform in a "faithful and workmanlike manner . . . all labor in laying all brick work at the Howard School addition . . . including chimneys, heating and ventilating system and any other brick work which may be required to complete the building according to plans and specifications, . . . and to comply with all conditions in the specifications relating to that part of the work included by this agreement. All work to be done to the satisfaction of the Superintendent of Public Property of the City of Brockton." The plaintiffs were to receive "six dollars per one thousand for all brick laid."

It appeared in evidence that these four masons had selected one of their number, William Simmons, as the working manager. Simmons testified that he partly had charge of the work, that the others looked to him to give directions, and that he received orders and directions from no one. The plaintiff, Eldred, was asked whether Simmons was in charge of the work and answered,

"We all did it together"; and when asked whether he was not the guiding hand replied, "Well, we kind of chose him to go ahead and look out."

The plaintiff, Goodspeed, testified that they worked in harmony with the carpenters, that on that morning no one directed them to go to work on the chimney, that they knew where to go to work of their own accord from time to time. "We took hold to the best advantage and kept it along wherever it was necessary or needed; on the morning [of the accident] we had about an hour's work on the gable and after the gable was finished we went inside on the chimney, there was no other work to do, we either had to go to work on the chimney or go home, and as they were very anxious to have the chimney done, of course it needed no telling from any one; there was no other place for us to work; it was necessary for us to work in that particular place and they had been urging us, well, for two or three days, at least, to hurry the chimney along. They took and advised and directed us, a general direction of the whole business."

The plaintiffs, on August 26, 1899, while at work on the second floor, looking for support for a staging for the chimney underneath said third floor, were injured by the fall of the third floor upon them. This floor was supported solely by a prop or shore under the main girder, the girder at the time not being fastened by the iron rods to the truss above. On the floor at the time it fell were one of the defendants and two workmen placing the iron rods in position.

One of the defendants was present practically all of the time and at the time of the accident was on the third floor. He testified that he had charge of the construction of the building generally speaking, and had tried to hurry the masons on their work and had asked them to put on more men. The superintendent of public buildings of the city had requested the defendants to hurry up the job. During the progress of the work, some changes were made in the work not required by the contract, and the plaintiffs were notified of the changes by the defendants and they were made, and the defendants at various times had directed the plaintiffs to hurry up with the chimney. On the day of the accident, the walls were up and all brick work completed except the chimney. There was evidence which was

denied that one of the defendants a short time before the floor fell remarked that the prop was bending; no notice was given to the plaintiffs of the condition of the prop or of the floor.

Evidence was submitted on the question of negligence of the defendants in improperly loading and supporting the third floor.

The Chief Justice instructed the jury as follows:

"The breach of duty which these plaintiffs allege as the ground of their action is that the defendants put them at work in a dangerous place. The court is of the opinion that there is no evidence which would warrant the jury in finding that the defendants put the plaintiffs at work in a dangerous place. Under their contract, they chose their own time and way of doing their work and did not receive from the defendants any specific direction to work in this particular place where the danger was encountered. It consequently becomes necessary to direct a verdict for the defendants."

The jury returned a verdict for the defendants; and the plaintiffs alleged exceptions.

H. H. Chase, for the plaintiffs.

L. E. Chamberlain & E. H. Fletcher, for the defendants.

MORTON, J. These two cases were tried together. The declaration in each case is the same and alleges in substance that the plaintiff was employed by the defendants, and, being himself in the exercise of due care, was negligently put to work by them in an unsafe and dangerous place, to wit, under a flooring which was heavily loaded with lumber and boards and improperly supported and which fell and injured him. The declarations evidently are drawn on the footing that the relations between the parties were those of master and servant.

The undisputed evidence showed that the defendants had contracted with the city of Brockton to build a brick schoolhouse, and had sublet a portion of the work to the plaintiffs and two other persons under a written contract between them and the defendants. It was provided in this contract that the work should be done by the plaintiffs and their associates "to the satisfaction of the Superintendent of Public Property of the City of Brockton." So far as appears the contract gave the defendants no control over the plaintiffs and their associates but they were at liberty to do the work in their own way and when they chose

so long as they performed their contract. It appeared in evidence that they selected one of their own number, one Simmons, as a working manager, and Simmons testified that "he received orders and directions from no one." The accident occurred while the plaintiffs were on the second floor of the building looking for staging for a chimney on which they were going to work, and was caused by the falling of the third floor. There was no evidence that they were going to work on the chimney, in consequence of any specific orders or directions by the defendants. On the contrary one of the plaintiffs testified that no one told them to go to work that morning on the chimney. He testified, in substance, that they knew where to go to work themselves and that there was no other work for them to do except on the chimney. There was evidence tending to show that the defendants had directed the plaintiffs to hurry up the chimney and for two or three days had been urging them to hurry it along. But this falls far short of showing that the defendants had assumed control of the work and of the plaintiffs and their associates. There was also evidence of other directions by the defendants, and one of the defendants testified that "he had charge of the construction of the building generally speaking," which is what we understand one of the plaintiffs to have meant when he testified that "they [the defendants] took and advised and directed us, a general direction of the whole business." Notwithstanding the directions that were given it seems to us plain that the relation between the parties was not that of master and servant but that of contractors and contractees and that the directions that were given were incident to that relation. It also seems to us clear that there was no evidence to warrant a finding that the plaintiffs were put to work by the defendants in an unsafe and dangerous place. We do not mean to say that if the relation between the plaintiffs and the defendants was that of contractors and contractees the defendants owed the plaintiffs no duty not to expose them to injury by reason of the want of due care on their, the defendants', part while they, the plaintiffs, were doing the work which they had contracted to do. *Curley v. Harris*, 11 Allen, 112. But we must deal with the case as it is presented, and as already observed the declarations are drawn on the footing of a relation of master and servant and of the plaintiffs having been

put to work as servants in an unsafe and dangerous place. For reasons given we think that this view cannot be sustained. In regard to *Indermaur v. Dames*, L. R. 1 C. P: 274, which is relied on by the plaintiffs, it is to be observed that though the declaration alleges an employment, the plaintiff was required as a condition of recovery to amend his declaration so as to conform to the facts proved.

Exceptions overruled.

LOUIS CHOQUETTE vs. LLEWELLYN G. FORD & another
& trustee.

Hampden. October 18, 1900. — February 27, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & HAMMOND, JJ.

Where a writ has been served by trustee process and judgment is entered against the defendant and the trustee, and the defendant appeals but the trustee does not, whether the question of charging the trustee is open to the defendant on his appeal, *quære*.

Where, in an action not for the price of necessities, two successive services of a writ were made by trustee process upon the employer of the defendant as trustee, and the trustee had in his hands at the time of each service upon him a sum less than twenty dollars due the defendant as wages, and thereafter the plaintiff failed to enter his writ and brought a new writ for the same claim adding another defendant as copartner of the defendant in the first writ, and served it upon the same trustee, and it appeared that the trustee had still in his hands the wages previously attempted to be attached, which in all exceeded the sum of twenty dollars, and nothing appeared to show want of good faith on the part of the plaintiff in abandoning his first action and bringing another against the two defendants, it was *held*, that the defendant's wages in the hands of the trustee in excess of twenty dollars were not exempt from attachment, the plaintiff being in the same position as if the new action had been brought by a third party.

CONTRACT, originally brought in the Police Court of Holyoke, on an account annexed for \$12.94 against two defendants as copartners, doing business under the style of Ford Brothers, and the Deane Steam Pump Company as trustee. Writ dated May 12, 1899.

The trustee added to its answer the following statement: "Said L. G. Ford was last paid by it [the trustee] before said May 12th on April 14, 1899; that there were two services upon it as trustee made previous to said May 12th and subsequent to

said last payment of April 14, 1899, on a writ other than the one on which service was made on said May 12th, but in which said Louis Choquette was plaintiff and said L. G. Ford a defendant; that said other writ was dated April 21, 1899, and returnable to this court May 20, 1899; that the first service of said other writ was made on April 21, 1899, at which time there was due to said Ford as wages earned in its employ \$13.35; that the second service of said other writ was made on May 5, 1899, at which time there was due to said Ford as wages earned in its employ \$12.60 in addition to the \$13.35 aforesaid; that nothing was paid to said Ford as an exemption or otherwise after said first service, made on April 21, 1899, and before the service of May 12, 1899; that nothing was paid to said Ford as an exemption or otherwise after said service of May 12, 1899, and before its answer as trustee."

The case came on appeal to the Superior Court, in which the following agreed statement was filed: "It is agreed that the claim declared on is not one for the necessities of life and also that there were three services made upon the Deane Steam Pump Company, the trustee named in said writ; that the writ upon which the first two services were made was never entered."

The Superior Court gave judgment charging the trustee on its answer, and entering judgment for the plaintiff against the defendants and the trustee. The defendants appealed.

F. F. Bennett, for the defendants.

J. O'Shea, for the plaintiff.

MORTON, J. The question in this case relates to the trustee. It was charged in the Superior Court on its answer and judgment was entered against the defendants and it. The defendants appealed but the trustee did not. The only question which has been argued is whether the trustee should have been charged. We assume without deciding that the defendants can raise that question on their appeal. It is agreed and the declaration apparently shows that the plaintiff's claim is not for necessities.

It appeared that previous to the writ in suit another writ had been sued out by the plaintiff in which the defendant Llewellyn G. Ford was the sole defendant. This writ was dated April 21 and was returnable May 20 before the Police Court of Holyoke. It was served on the trustee April 21, at which time

there was due said Ford from the trustee as wages \$13.35. It was served again on the trustee May 5, on which date there was due Ford from the trustee the additional sum of \$12.60 for wages. Nothing was paid Ford by the trustee as an exemption or otherwise after the first service. This writ was never entered. On May 12 the writ in the present action was brought against the aforesaid Llewellyn G. Ford and one William Ford, described as late copartners under the style of Ford Brothers. This writ was served on the trustee on May 12 and was duly entered and is the one to which the trustee appeared and answered. There is nothing to show, except as it may be inferred from the facts above stated, that the second writ was brought and the first abandoned otherwise than in good faith. We cannot infer abuse of process from the mere fact that the first writ was not entered. There may have been good reasons for not entering it and for bringing the second writ in the form in which it was brought.

The defendants contend that the wages were exempt from attachment on the writ in the present action. No doubt the trustee could have paid to Ford what was due him at each service on it of the first writ and would have been protected in so doing. Pub. Sts. c. 183, § 30. *Hall v. Hartwell*, 142 Mass. 447. *Sullivan v. Hadley Co.* 160 Mass. 32.

No doubt also if the first writ had been entered Ford would have been entitled to the benefit of the exemption at each service. *Hall v. Hartwell* and *Sullivan v. Hadley Co.*, *ubi supra*. But this is not one of those cases.

We cannot doubt that if some other person than the plaintiff had brought the present writ Ford would not have been entitled to exemption on account of the two services on the first writ. And where there is nothing to show that the abandonment of the first writ and the bringing of the second writ in which an additional party is included as defendant was not in good faith, we do not see why the plaintiff should be in any worse position than a third party would be. In the case of *McNally v. Wilkinson*, 20 R. I. 315, relied on by the defendants, the court evidently was satisfied that there had been an abuse of process. The second writ in that case was brought by the same plaintiff as in the first writ and against the same defendant and trustee. In this case there was joined as defendant in the second writ another

party with the defendant in the first writ, and we cannot say, as already observed, that there may not have been good reasons for the course that was taken.

Judgment affirmed.

JOHN B. DEMERS vs. JAMES MARSHALL.

Bristol. October 22, 1900. — February 27, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & HAMMOND, JJ.

In an action brought by an apprentice against his employer, to recover for injuries from being caught on a set screw on the collar of a revolving shaft, there was evidence that for ten years previous to the accident set screws to a great extent had been going out of use on account of the adoption of safer substitutes, but were still used in factories as a recognized device for holding the collar to the shaft. *Held*, that the defendant was not bound to change the set screw or to point it out to the plaintiff.

An apprentice in a machine shop injured by being caught on a set screw on the collar of a revolving shaft, while attempting to oil the shaft, cannot recover from his employer, the risk being an obvious one which he assumed.

An apprentice in a machine shop who was instructed to oil a revolving shaft using a step ladder placed at a certain spot, and who finding that spot occupied by castings piled upon the floor, which he might have got permission to remove, put the step ladder in another place and by reason of so doing, while reaching over the shaft which he was attempting to oil, was caught by the sleeve on a set screw on the collar of the shaft, and who testified that it was quite dark at the time, was held to be acting without due care.

TORT to recover compensation for injuries received by the plaintiff while employed in a machine shop connected with the hat factory of the defendant. Writ dated January 15, 1897.

A former verdict for the plaintiff in this case was set aside under a decision of this court reported in 172 Mass. 548. At the new trial in the Superior Court, before *Braley*, J., the following facts appeared :

The plaintiff, a young man eighteen years old, who had previously worked as a weaver three or four months, entered the employment of the defendant as an apprentice in the machine shop about three weeks before the accident. He was turned over to one McClellan, an experienced apprentice, to be shown his duties. Among other things he was directed to oil the shaft-

ing once a week. McClellan took him to a place near the end of a shaft and, while the plaintiff was watching, placed a step ladder under the shaft and poured the oil from an oil can into a small oil hole on the shaft hanger. On the shaft near this oil hole was a collar, held in place by a set screw projecting therefrom between an inch and one eighth and an inch and seven eighths. The shafting revolved at the rate of from ninety to a hundred revolutions a minute. The set screw was plainly visible from the floor "and you could see it going round if you looked at it." It was not in the way of one approaching the oil hole when the step ladder was placed as McClellan placed it when he was showing where and how to oil. Two weeks later, the plaintiff being asked by McClellan if he had oiled up, replied that he had forgotten to but would go and do it. The plaintiff then procured a step ladder and, because there were some castings on the floor at the spot where McClellan had placed the step ladder in showing him how to oil, set his ladder on the opposite side of the shafting, and with his oil can climbed up so as to be close to the shafting at the place where the set screw and oil hole were, with the upper part of his body above the shafting. Reaching over the set screw and the shafting, he undertook to put the oil into the oil hole, and the loose sleeve of his overall jacket catching in the set screw bound him to the shafting and he revolved with it. The castings, thrown in a heap on the floor, were brought there by the plaintiff and others by order of the foreman, one Sackett. As to these castings, the plaintiff testified that he could have laid them one side if he was told to, but that he did not know that Mr. Sackett would have been satisfied to take them away from there. The plaintiff testified that the set screw had never been pointed out to him; that when he set up his ladder he looked up and saw the shafting revolving; that he could see the oil hole; that he did not see the set screw; that he did not look to see what was there; that he looked for the oil hole and that was all he looked for, and that it was quite dark.

It was agreed "that ten years ago such a device, a projecting set screw, with others, was in common use, but since that time this device has been going out of use, and in the last ten years it has not been commonly used in establishments constructed

during that time, although it is used in some instances in such establishments, and that many establishments existing ten years ago have got rid of this device and substituted another; that the device on account of the great danger attending it has been regarded by mechanics in this period as unsuitable. The projecting set screw, however, does the work intended of holding the collar to the shaft."

John Marshall, called by the plaintiff, testified that he was a brother of the defendant, and that he was interested in and connected with the hat factory; that he thought the hat factory was started about 1892; that the building was formerly the old Wyoming Thread Mill, and the room where the accident happened was the machine shop of the old mill; that he came from Pawtucket, and that the first time he went into the factory was after it was started; that he found the shafting there, but that he did not know whether or not any change had been made in the shafting of the old machine shop, and that he did not know how long the shafting had been there.

At the conclusion of this evidence, the defendant asked the judge to direct a verdict for the defendant. This ruling was given, against the objection of the plaintiff. The jury returned a verdict for the defendant as directed. At the request of the parties the judge reported the case for the consideration of this court, upon the agreement that if the ruling directing the verdict for the defendant was wrong, the question of liability was to be considered settled in favor of the plaintiff, and the case was to be sent to a jury solely for the purpose of assessing damages. If the ruling was right, then judgment was to be entered on the verdict for the defendant.

J. W. Cummings, (E. Higginson & C. R. Cummings with him,) for the plaintiff.

J. F. Jackson, (R. P. Borden with him,) for the defendant.

MORTON, J. We do not think that the additional evidence introduced at the last trial requires or would justify a different view from that which was taken when the case was here before. 172 Mass. 548. Notwithstanding it now appears that projecting set screws have been going out of use for the last ten years on account of safer substitutes, and have not been commonly used in establishments constructed during that time, the new evidence

falls far short, as a whole, of showing that they are not still commonly used for holding collars and pulleys on to shafts and are not a well recognized device for that purpose. It is expressly stated, indeed, that they have been used in some new establishments, and though it is said that many establishments existing ten years ago have got rid of them and have adopted other devices, it is plain that many establishments still continue to use them. The defendant was not bound to change the set screw or to point it out to the plaintiff. The uncontradicted testimony was that it could be seen from the floor and the danger from the revolving shaft was apparent. The risk was an obvious one which the plaintiff must be held to have assumed. *Hale v. Cheney*, 159 Mass. 268. *Rooney v. Sewall & Day Cordage Co.* 161 Mass. 153, cited in *Wilson v. Massachusetts Cotton Mills*, 169 Mass. 67, 71, and *Donahue v. Washburn & Moen Manuf. Co.* 169 Mass. 574, 575. *Ford v. Mt. Tom Sulphite Pulp Co.* 172 Mass. 544. Moreover, instead of putting up his ladder on the side on which he had been instructed to put it up, the plaintiff, without any direction from any one, put it up on the opposite side, and, without any examination, attempted to do the oiling by reaching over the revolving shaft in close proximity to it. This was a dangerous thing to do, especially if, as he testified, "it was quite dark," and showed a want of due care. There was nothing to prevent him from moving the castings or at least from speaking to the foreman about doing so.

The testimony of John Marshall would not have warranted a finding, if that was material, that the mill had been constructed within ten years or that the piece of shafting was new.

Judgment on the verdict.

MICHAEL R. DALEY vs. PEOPLE'S BUILDING, LOAN AND
SAVING ASSOCIATION.

Bristol. October 22, 1900. — February 27, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & HAMMOND, JJ.

A holder of a certificate in an association requiring monthly payments from its members made default in a monthly payment due January 28. On July 11 following a notice was published to all stockholders "who are in default for six months or more in the payment of dues," to pay in sixty days under penalty of forfeiture. After the lapse of sixty days, the association, its directors having passed a vote of forfeiture, in good faith notified the certificate holder that his stock was forfeited. This was a mistake, the default not having existed six months before the notice. Thereupon the certificate holder sued the association to recover all sums paid by him under his certificate, on the ground that the association had repudiated its contract and the consideration for the payments had failed. *Held*, that the mistaken announcement to the certificate holder that his stock was forfeited was not a repudiation of the contract which gave him a right to rescind it, and that he could not maintain his action to recover back the consideration.

A certificate of membership in a New York corporation, which made the terms and conditions printed on its back a part of the contract with the certificate holder, had printed on its back as one of the conditions a provision that "any action brought against this association by any shareholder shall be brought in the County of Ontario, State of New York." *Held*, that this condition should be enforced, and that an action on the contract contained in the certificate could not be maintained in Massachusetts.

CONTRACT with two counts, the first count declaring on a promise alleged to be contained in the certificate of the defendant held by the plaintiff as stockholder, to pay the plaintiff \$1,000 in five years from January 1, 1890; and the second count declaring on an account annexed, to recover sixty monthly payments of \$10 each and twenty quarterly payments of \$2.50 each made by the plaintiff to the defendant between January 1, 1890, and December 31, 1894, under the terms of said certificate, with interest thereon, amounting in all to \$862.88. Writ dated December 16, 1897.

At the trial in the Superior Court, before *Braley, J.*, it appeared that the plaintiff's certificate was Number 2544 for ten shares, and that the face of it read as follows: "This is to certify that Michael R. Daley of Fall River, State of Massachusetts, is hereby constituted a shareholder in The People's

Building, Loan and Saving Association, incorporated under the laws of the State of New York, and holds 10 shares therein of One Hundred Dollars each, and in consideration of the entrance fee, together with agreements and full compliance with the Terms and Conditions printed on the back of this Certificate, and the Articles of Association and By-Laws adopted by the said Association, all of which are hereby referred to and made a part of this contract, the said The People's Building, Loan and Saving Association agrees to pay said shareholder, or his heirs, executors, administrators or assigns, the sum of one hundred dollars for each of said shares, at the end of five years from the date hereof, or, in case of his death before the expiration of said term, then a sum of money equal to the amount of monthly installments paid on said shares, together with all dividends accrued thereon; all of which are payable in the manner and upon the conditions set forth in the articles of association and by-laws and terms and conditions printed on the back of this certificate. Given under the seal of said Association, at Geneva, N. Y., this first day of January, 1890. D. F. Attwood, Sec'y. M. S. Sanford, Prest."

Among the Terms and Conditions printed on the back of the certificate were the following: "First. The shareholder or person who is to pay all installments under this Certificate, agrees to pay or cause to be paid to the Association a monthly installment of one dollar for each share mentioned in the certificate, on or before the last Saturday of each month during the continuance of the certificate.

"Second. The shareholder or person who is to pay all installments under this certificate, agrees to pay, or cause to be paid to the Association, a quarterly installment of twenty-five cents for each share mentioned in the certificate, on or before the last Saturday of the third, sixth, ninth and twelfth months of each current year."

Then followed provisions for fine, cancellation and forfeiture in case of non-payment of instalments when due.

"Eighth. The Articles of Association, By-laws, terms and conditions, together with the application, are to be construed together as the contract between the Shareholder and the Association."

"Tenth. All payments under the within certificate are payable at the office of the People's Building, Loan and Saving Association, Geneva, N. Y., after acceptance and approval of satisfactory proofs.

"Eleventh. Any action brought against this Association by any Shareholder shall be brought on or before six months after filing his proofs, and in the County of Ontario, State of New York."

It appeared that the plaintiff made all payments required by the contract up to January 26, 1895, but on that day and thereafter failed to make the payments required.

At a meeting of the board of directors of the defendant, held on March 26, 1895, the following resolution was adopted: "Resolved, That the proper officers of the association, by legal proceedings at once publish notice of forfeiture of stock now forfeitable under articles of the association and By-Laws, except borrowing stock and that all stock in arrears be forfeited on completion of legal proceedings and that said action be taken every three months until further order."

It was admitted by the plaintiff that the following notice to stockholders signed in the name of the defendant by its president and secretary was published in the Syracuse Post Express, a weekly newspaper, at least once a week for ten successive weeks, beginning July 11, 1895:

"To all stockholders and members of the People's Building, Loan & Saving Association who are in default for six months or more in the payment of dues, installments or money upon stock owned by you in said association:

"Take notice that you are hereby required to make payment to the association within sixty days from the date of this notice, at its office, 215 Kirk Block, Syracuse, N. Y., of all installments, dues, fees, fines or moneys due and unpaid on the capital stock of said association owned by you, according to its articles of association, by-laws, rules and regulations; and that in case of your failure to do so your shares of stock and all previous payments made thereon will be forfeited. Dated Syracuse, N. Y., July 11, 1895."

At a meeting of the board of directors of the association held on November 12, 1895, the following resolution was adopted:

"Resolved, That all stock in arrears for six months or more, the holders of which have been served with notice by publication, and more than sixty days having elapsed since publication of said notice, be and the same is hereby forfeited, and the amounts paid on the same shall be placed in the undivided earnings of the association."

To the minutes of the meeting was attached a typewritten list entitled "List of Forfeited Stock," on which appeared, among other names, the following: "M. R. Daley, Fall River, Mass., No. 2544."

In a letter dated December 4, 1895, in answer to a letter sent by the plaintiff to the defendant the secretary of the defendant wrote to the plaintiff: "Your certificate for ten shares has been forfeited for non-payment of dues in accordance with the rules of the association," and this statement was repeated in letters from the secretary to the defendant dated December 28, 1895, and April 25, 1896, the last named letter being as follows: "Replying to your favor of the 23rd. Your certificate No. 2544 has been forfeited for non-payment of the dues."

All other material facts are stated in the opinion of the court.

At the close of the evidence, at the request of the defendant and against the objection of the plaintiff, the judge ruled that the plaintiff could not recover, and the jury being so directed, returned a verdict for the defendant.

At the request of the parties, the judge reported the case for the consideration of this court, with the agreement, that if such ruling and direction was wrong, judgment was to be entered for the plaintiff as of January 8, 1900, for \$862.38, with interest from the date of the writ, or in case the plaintiff was entitled only to recover the withdrawal value of his stock, for \$554.07, with interest from the date of the writ; otherwise judgment was to be entered on the verdict.

C. R. Cummings, for the plaintiff.

C. M. Elliott, (of New York,) for the defendant, submitted the case on a brief.

HOLMES, C. J. This is an action by a member of the defendant corporation, counting first for \$1,000 upon the covenant contained in his certificate of membership, and secondly on an account annexed, which is for the money paid by the plaintiff

for and under the certificate. The first count was disposed of by the decision reported in 172 Mass. 533. The right to recover on the second now is argued on the footing that the defendant declared a forfeiture of the plaintiff's stock without right, and that therefore the plaintiff at his election may treat the contract as repudiated and annihilated as if from the beginning, and may recover the consideration which he has paid. The case comes here by report after a ruling that the plaintiff could not recover. The first count being on the contract and the second being on a supposed right which depends on the annihilation of the contract at the plaintiff's election, it is a little hard to see how the plaintiff can press the second after having gone to trial and done his best to recover upon the first. *Whiteside v. Brawley*, 152 Mass. 133, 135. But we will pass to the other considerations in the case.

The report states that "no question arises as to the pleadings." We should suppose this to mean that the ruling of the court was on the substance of the case and not upon any question of form. We hardly should take it to open an argument that the plaintiff had a cause of action for the withdrawal value of his certificate, a matter quite different from the subject of either of the counts. That would be a claim under the contract of a different nature from the one set up in the first count, and of course it would be different also from the claim in the second count. The plaintiff does not attempt to make out a case of that new kind, and it is questionable whether if he did he could succeed. After being informed that the amount standing to the credit of his certificate was \$690.38, he had written in a threatening tone a letter which implied that he insisted on being paid a thousand dollars. A conciliatory reply stated that if he desired the withdrawal value of his certificate the defendant would send a withdrawal blank. The plaintiff answered, it is true, that he desired the withdrawal value of his certificate, but the letter indicated pretty plainly that he meant by this the whole thousand dollars. His conduct showed that that was what he intended to get. The application returned to him was not signed, and he said nothing for nearly a year, when again he pressed for a thousand dollars. Whether he ever did anything sufficient to indicate that he wanted the withdrawal value we need not consider further.

We find it still more difficult to see how the plaintiff can recover as upon a rescission. The plaintiff says that the defendant was wrong in supposing that his stock was forfeited. The plaintiff made default in a monthly payment due on the last Saturday of January, the 26th. A notice was published on July 11 to all stockholders "who are in default for six months or more in the payment of dues" etc. to pay in sixty days under penalty of forfeiture. Without considering what could be said on the other side, we assume that the notice was a condition of the power to forfeit, that it did not hit the plaintiff as his default was a few days less than six months before July 11, and that the defendant was wrong. But all that the defendant did was to notify the plaintiff that his stock was forfeited, seemingly under a *bona fide* belief that he fell within the class described in the notice. It would be straining the facts and the law to say that this imported a refusal, before any demand, to pay any sum under the policy even if the defendant's mistake should be pointed out, and that therefore it was a repudiation.

A mere refusal to pay money when due, especially a refusal based upon the terms of the contract and in good faith although mistakenly believed to be justified by it, is not a repudiation of the contract and does not warrant a rescission. The only remedy is a suit upon the contract, not a suit for the consideration. This is clearly the law in the case of a failure to pay the price after a sale and delivery of goods. *Martindale v. Smith*, 1 Q. B. 389. The law would seem to be even clearer when, as here, the plaintiff has had the rights of membership in the defendant company for five years, not to speak of his having elected to insist upon his covenant, as we mentioned at the outset. Conduct going no further than the defendant's might not justify even a refusal of further performance on the other side, *Mersey Steel & Iron Co. v. Naylor*, 9 App. Cas. 434, a right which must not be confounded with rescission, and which in some cases is more easily made out. *Boston Deep Sea Fishing & Ice Co. v. Ansell*, 39 Ch. D. 339, 365. *Stubbs v. Holywell Railway*, L. R. 2 Ex. 311, 314. In *True v. Bankers' Life Association of Minnesota*, 78 Wis. 287, the question of the form of the remedy does not seem to have been brought to the attention of the court.

As in our opinion the contract between the parties has not

been ended, there is a further ground upon which their case is disposed of, which we thought in our earlier decision that it would not be necessary to consider. The certificate is granted in consideration, among other things, of "full compliance with the Terms and Conditions printed on the back, . . . all of which are hereby referred to and made a part of this contract." One of the conditions is that "Any action brought against this Association by any Shareholder shall be brought . . . in the County of Ontario, State of New York." We are of opinion that this condition should be enforced.

We do not mean to overrule *Nute v. Hamilton Ins. Co.* 6 Gray, 174, but it is obvious that that was a somewhat hesitating decision, and we think that it should not be pressed so far as to dispose of this case. Here we are dealing with a New York corporation, most of whose members would live in New York, and the greater part of whose dealings and contracts naturally would take place also in New York. There, we take it from *Greve v. Aetna Live Stock Ins. Co.* 81 Hun, 28, which was put in evidence, the condition would be an answer to an attempt to sue in another county. The condition, at least so far as we have occasion to consider it, refers to suits by members of the corporation as such. It is perfectly reasonable, and as applied to a New York corporation in view of the New York law cannot be held contrary to the policy of Massachusetts with regard to such contracts as happen, by the accidents of post-office communication, to be concluded on this side of the boundary line. The language is different from that used in *Nute v. Hamilton Ins. Co.*, and stronger. It plainly purports to attach a condition to the contract, and we are of opinion that it does so effectually. It is not intimated in *Nute v. Hamilton Ins. Co.* that when such a condition is attached to a contract and is valid, there is any technical difficulty in enforcing it as an answer to an action in another place.

It is true that in this case the question is not between counties but between States, and that our decision requires a resident of Massachusetts to go elsewhere for a remedy upon a contract made here. *Reichard v. Manhattan Ins. Co.* 31 Mo. 518, 520, 521. But objections of this sort may be made to appear more serious than they are. Courts are less and less disposed to in-

terfere with parties making such contracts as they choose, so long as they interfere with no one's welfare but their own. The plaintiff might have given his money to the corporation if he had seen fit. We see no reason why he might not give it upon such partial return as he was content to accept. It will be understood that we are speaking of parties standing in an equal position where neither has any oppressive advantage or power, and that our decision as to the validity of the condition as a defence does not go beyond the particular circumstances of this case. See further *Matter of New York, Lackawanna & Western Railroad*, 98 N. Y. 447, 453; *Heslin v. Eastern Building & Loan Association*, 28 Misc. (N. Y.) 376; *Carpenter v. Shepardson*, 43 Wis. 406, 413.

Judgment for the defendant.

HENRY K. WHITE *vs.* NEW BEDFORD COTTON WASTE
CORPORATION.

Bristol. October 22, 1900. — February 27, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & HAMMOND, JJ.

If a plaintiff discontinues an action against one of two defendants and by mistake of remedy proceeds unsuccessfully against the wrong defendant, this is no bar to a subsequent action against the other.

An infant does not lose his right to disaffirm a contract because he cannot put the other party to the contract *in statu quo*.

The subscribers for shares of a corporation that has voted to wind up its business and has transferred all its property to a new corporation formed for the purpose, who receive certificates for shares in the new corporation to the number subscribed for in the first corporation, continue to be stockholders of the first corporation and are not partners in relation thereto.

CONTRACT to recover \$1,000 paid by the plaintiff to the defendant upon his subscription while a minor for ten shares of the capital stock of the defendant. Writ dated January 14, 1899.

The case was heard in the Superior Court by *Bell, J.*, upon the following agreed facts: The defendant corporation was organized under Pub. Sts. c. 106, on April 30, 1894. The capital

stock authorized by its charter was \$75,000, and the par value of its shares was fixed at \$100 each. At the first meeting of the corporation one Caswell was elected treasurer. Caswell, as treasurer of the corporation, in consideration of an agreement made by the plaintiff to subscribe for ten shares of the capital stock of the corporation, promised and agreed to give the plaintiff a situation as bookkeeper in the corporation, in consequence of which the plaintiff subscribed for the ten shares of stock, and on September 7, 1894, the plaintiff paid therefor to Caswell \$1,000. The plaintiff received from the defendant its receipt acknowledging the payment of \$1,000, and certifying, that, in consideration of this payment, the plaintiff was entitled to a certificate for ten shares of the capital stock of the corporation. At the time of the agreement between Caswell and the plaintiff, and at the time of the payment of \$1,000 by the plaintiff to the defendant, the plaintiff was under the age of twenty-one years, having been born June 26, 1876.

On August 14, 1894, the defendant took a bond for a deed of land upon which a building was to be erected for carrying on its business, and began the construction of a building, but before the building was completed the defendant learned that an officer of the corporation had made false representations as to the amount of *bona fide* subscriptions for its capital stock. Thereupon the officers and *bona fide* subscribers for the stock of the defendant and others proceeded to form a new corporation, and under articles of association, dated December 29, 1894, met and organized the Mount Pleasant Mills Corporation, to which a certificate of incorporation was issued January 7, 1895. The capital stock of the new corporation was the same in amount and in the par value of its shares as that of the defendant.

On May 18, 1895, the defendant voted that its affairs and business be wound up and terminated; a member of the corporation was given full authority to take such action as was necessary to wind up and terminate the affairs and business of the corporation, and he was also authorized to sell and convey all its property to the Mount Pleasant Mills Corporation. In pursuance of these votes all the property of the defendant, real and personal, was transferred and conveyed to the Mount Pleasant Mills Corporation, upon the agreement and undertaking by the

latter to pay to the former about \$11,300 therefor, and that the former should pay back to the latter \$11,000, in consideration of which the Mount Pleasant Mills Corporation agreed to issue, at par, certificates of its stock to the amount of \$10,000 to such subscribers for the stock of the defendant as had paid in their subscriptions for stock in full, each of such subscribers to have a certificate of stock in the Mount Pleasant Mills Corporation for the same number of its shares as he had fully paid for of the shares of the defendant. These agreements were performed by the respective corporations. The defendant never carried on business, and never issued any certificates of stock to the plaintiff or to anybody else. After having conveyed all its property to the Mount Pleasant Mills Corporation it never acquired any property of any kind. It had never taken any steps for dissolution of the corporation by law.

The plaintiff had full knowledge of the foregoing facts, was present at all the meetings of the corporations, and assented to all the votes of the defendant described above. On July 25, 1895, the Mount Pleasant Mills Corporation issued to the plaintiff a certificate for ten shares of its capital stock, and upon receipt of this certificate the plaintiff surrendered to the Mount Pleasant Mills Corporation his receipt for \$1,000 which he had received from the defendant entitling him to ten shares of the capital stock of the defendant.

The Mount Pleasant Mills Corporation received no money or other payment from the plaintiff in consideration of its issuing to him the ten shares of its capital stock which he received from that corporation. That corporation never carried on the business for which it was organized, and its effects were sold at public auction.

On or about January 7, 1896, the plaintiff, while still a minor, served notice upon both corporations that he rescinded on the ground of infancy all contracts and agreements made with either of them, and tendered to each of the corporations the certificate for said ten shares of stock and demanded \$1,000 from each of them.

On January 14, 1896, the plaintiff, being still a minor, sued out a writ from the Superior Court of the County of Bristol against the New Bedford Cotton Waste Corporation and the

Mount Pleasant Mills Corporation, in an action of contract for money had and received, for the recovery of the \$1,000, and made profert in that court of the ten shares of the Mount Pleasant Mills corporation capital stock, by attaching it to the declaration in his writ.

Upon a hearing of the last named action, the plaintiff discontinued against the New Bedford Cotton Waste Corporation, the present defendant, and prosecuted his suit solely against the Mount Pleasant Mills Corporation. The court found for the defendant, and the plaintiff appealed. The case was heard in this court, where the finding for the defendant was affirmed, on the ground that the plaintiff had made no payment to the Mount Pleasant Mills Corporation, his only payment being to the present defendant. See 172 Mass. 462.

It was agreed that if upon the foregoing facts the plaintiff was entitled to maintain this action, judgment should be entered for the sum of \$1,000, with interest thereon from January 14, 1896, the date of the bringing of the former action, to the date of the writ in the present action, January 14, 1899; otherwise, the entry should be judgment for the defendant.

The judge found for the plaintiff, and assessed damages at \$1,180 in accordance with the foregoing agreement; and the defendant appealed.

M. R. Hitch, for the defendant.

T. F. Desmond, for the plaintiff.

MORTON, J. The plaintiff, a minor, originally brought suit against the defendant corporation and the Mount Pleasant Mills Corporation. When that case came to trial he elected to proceed against the Mount Pleasant Mills alone, and discontinued as to the present defendant. The Mount Pleasant Mills had judgment and the plaintiff appealed and the judgment was affirmed by this court. The case is reported in 172 Mass. 462, and the material facts are the same in this case as they were in that. This action was brought after the case against the Mount Pleasant Mills was disposed of. It is manifest that the discontinuance of the former action against the present defendant and its prosecution against the Mount Pleasant Mills alone, being a mistake in regard to a matter of remedy merely, cannot operate to prevent the maintenance of this action. *Butler v. Hil-*

dreth, 5 Met. 49, 52. If the transaction had stopped with the defendant corporation and the Mount Pleasant Mills had not been organized, we do not understand the defendant to contend that the plaintiff upon disaffirming his subscription and tendering back the receipt would not have been entitled to recover of the defendant the thousand dollars which he had paid. The defendant's contention is that it voted as it had the right to do to close up its affairs and transfer all its property to the Mount Pleasant Mills; that it made such transfer and received therefor stock in the latter company as agreed; that the plaintiff knew and assented to all that was done and surrendered his receipt to the Mount Pleasant Mills and received from it a certificate of ten shares in that corporation in lieu of the ten shares for which he had subscribed and paid in the defendant corporation, and that he cannot now disaffirm the original transaction and all that has been done and recover back the money paid by him to the defendant. In other words the defendant's contention is that the plaintiff cannot be allowed to disaffirm and to recover because the defendant cannot be put *in statu quo*, as it is clear that it cannot. If the plaintiff's right of recovery depends on his putting the defendant *in statu quo* he must fail. But the right of a minor to disaffirm a contract does not depend on his putting the other party *in statu quo*. If it did he would lose in many cases the protection which the law affords him by reason of his minority. *Morse v. Ely*, 154 Mass. 458. *Dubé v. Beaudry*, 150 Mass. 448. *McCarthy v. Henderson*, 138 Mass. 810. *Walsh v. Young*, 110 Mass. 396. *Chandler v. Simmons*, 97 Mass. 508, 514.

In some cases it has been held that where the contract was beneficial to the minor and had been executed, he could not disaffirm without putting the other party *in statu quo*. *Breed v. Judd*, 1 Gray, 455. *Welch v. Welch*, 103 Mass. 562. But this is not such a case. If it is for the minor to elect whether a contract is beneficial or not, then the plaintiff has exercised his election to disaffirm in this case. If it is a matter of law whether the contract is to be regarded as beneficial, it clearly could not be held in this case that it was beneficial. The defendant contends that after the votes to wind up its business and after the transfer of its property to the Mount Pleasant Mills, the rights of the stockholders of the defendant corpora-

tion were similar to those of partners upon a dissolution of a partnership. But the corporation was not dissolved and as between themselves or between themselves and others, the members of the corporation were stockholders and not partners. And, in the absence of fraud or misrepresentation on the part of the plaintiff, we do not see how the fact that with his knowledge and assent the defendant corporation has transferred all its property and assets to the Mount Pleasant Mills can estop him from disaffirming what he has done and from maintaining this action against the defendant.

Judgment affirmed.

EUGENIE LAVIGNE, executrix, vs. LIGUE DES PATRIOTES,
MARILDA CHASSE, claimant.

Bristol. October 22, 1900. — February 27, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & HAMMOND, JJ.

Under St. 1888, c. 429, § 8, which is not changed by subsequent amendments as to the words in question, a mortuary benefit on the death of a member of a fraternal beneficiary corporation may be payable to the "children, relatives of, or persons dependent upon such member." *Held*, that an illegitimate infant daughter of a deceased member not supported by him during his lifetime, who was designated by him as his beneficiary, could not take as such beneficiary, not being a child or relative of or person dependent upon such member within the meaning of the statute.

CONTRACT brought by the sister and executrix of the will of Alexander Lavigne, to recover the sum of \$680 as a mortuary benefit. Writ dated April 23, 1900.

The case was heard in the Superior Court by *Bell, J.*, upon the following agreed facts: Alexander Lavigne at the time of his death, on September 3, 1899, was a member of the Ligue des Patriotes, a fraternal beneficiary corporation in Fall River, organized under St. 1888, c. 429. Article 28 of the by-laws of the corporation provided that the "widow or other legal beneficiary of a deceased member shall be entitled to one dollar per active member of the society in good standing, if the deceased had complied with the rules relating to the mortuary fund."

At the time of his death the deceased was a member in good standing of the defendant society, and had complied with the rules relating to its mortuary fund. He died unmarried and without legitimate children. By his will he left the benefits coming to him from the society to the plaintiff, his sister, who was also made residuary legatee and appointed as his executrix by the Probate Court, February 16, 1900. At the time of Lavigne's death the defendant society was under obligation to pay \$680 to his legal beneficiary by virtue of the by-law above quoted. No provision was made in the society's by-laws as to designation of a beneficiary, and no certificate was issued by it to the deceased; and the society has never issued certificates to any of its members.

The claimant, Marilda Chasse, was at the time of the trial a minor five years of age, living with her mother, a married woman, whose husband was living but had been separated from his wife for the last twelve years. There had never been any decree of court relating to such separation. The deceased boarded with the claimant's mother, and paid his board regularly until he was taken ill with consumption and became unable to work, and fell into arrears for his board. The plaintiff paid his dues to the defendant society and advanced him money for his board, medical care and attendance; without such assistance on the part of the plaintiff Lavigne's membership in the society during the last year of his life would have lapsed, and he would have lost the sick benefits which he received from it during his illness, and the mortuary benefits at his death for which this action was brought. While Lavigne was ill he executed the following designation in favor of the claimant: "Fall River, Mass., November 2, 1896. I, Alexander Lavigne, a member of the Ligue des Patriotes of Fall River, hereby give to and designate Marilda Chasse as the beneficiary entitled to all mortuary or other benefits coming to me or my beneficiary, in case of death, from said Ligue des Patriotes; said Marilda Chasse being my natural child, and this agreement or designation is made as a recognition of the moral obligation I am under to provide for and support said child. Alexander Lavigne."

Lavigne never contributed to the support of the claimant or

of her mother except by paying his board when he was able; such payment formed part of their support; the claimant's mother was in good health; she had other boarders and took in washing. Shortly after executing the foregoing designation Lavigne left the claimant's mother's house to go to his father's house, and subsequently to the hospital where he died. He left no estate other than the mortuary benefits coming from the defendant society.

The above designation was never communicated to or accepted by the defendant society during the lifetime of Lavigne. After his death the claimant, through her counsel, informed the defendant society that she claimed the mortuary benefits of the deceased under the above designation. The plaintiff as executrix also claimed the benefits from the society, on the ground that the above designation was not valid. The defendant society appeared and stated that it held \$680 as mortuary benefits of the deceased; that the benefits were claimed by the plaintiff and the claimant Marilda Chasse, and that it did not know to whom they belonged; that it was ready to pay them under a decree of court to the beneficiary entitled to them, and asked that the claimant be summoned in and that both parties litigate their respective claims under St. 1886, c. 281. The court made Marilda Chasse a defendant and she appeared by counsel, and her mother was appointed guardian *ad litem*.

It was agreed that the court might draw such inferences from the foregoing facts as it deemed proper and enter such judgment as the law requires. The judge found as a fact that Marilda Chasse was the illegitimate child of Alexander Lavigne.

The judge found for the plaintiff in the sum of \$680; and the claimant appealed to this court.

L. E. Wood, for the claimant.

H. A. Dubuque, for the plaintiff.

MORTON, J. At the time of his death the plaintiff's testator was a member in good standing of the defendant corporation which is a beneficiary association. The association admits that it has in its hands \$680 as mortuary benefits of the deceased and is ready to pay it to the plaintiff or the claimant as the court may decide. There are no other claimants. Marilda Chasse the claimant is the illegitimate child of the testator. The plaintiff

is the testator's sister and is executrix of his will which has been duly proved and allowed. By this will he left to his sister the benefits coming to him from the association. He also made her residuary legatee. Afterwards by an instrument in writing he designated said Marilda Chasse as the beneficiary entitled to all mortuary or other benefits coming to him or his beneficiary from the association, describing her in the instrument as his natural child, and alleging that the designation was made in recognition of his moral duty to support her. He never contributed to her support except in the sense in which he did so by paying his board when able to her mother with whom he boarded. The mother kept other boarders and took in washing. The plaintiff paid his dues to the defendant society and advanced him money for his board, medical care and attendance; without such assistance on her part his membership in the society during the last year of his life would have lapsed and he would have lost the sick benefits which he received and the mortuary benefits at his death for which this action has been brought. The question is whether the said Marilda Chasse was or could be legally designated as the beneficiary in accordance with Article 28 of the by-laws of the association that the "widow or other legal beneficiary of a deceased member shall be entitled" etc., and the statutes applicable to such associations.

This association was organized under St. 1888, c. 429. By § 8 of that statute the beneficiaries were limited to "the husband, wife, children, relatives of, or persons dependent upon such member." The statute has since been extended so as to include affianced husband and affianced wife, St. 1890, c. 341, § 1, St. 1894, c. 367, § 8, and child by legal adoption and parent by legal adoption, St. 1898, c. 474, § 11, St. 1899, c. 442, § 11, but the other beneficiaries remain the same. No one outside of the classes thus named can be a beneficiary. *Brierly v. Equitable Aid Union*, 170 Mass. 218. *American Legion of Honor v. Perry*, 140 Mass. 580. Is the claimant a child of, or a relative of, or a person dependent upon the deceased member within the meaning of the statute? By "children," as that word is used in the statute, is meant, we think, legitimate children. *Kent v. Barker*, 2 Gray, 535. *Jarm. Wills*, (6th Am. ed.) 1076. The word "relatives" is of broader scope but manifestly cannot be

held to include an illegitimate child. *Esty v. Clark*, 101 Mass. 36. *Kimball v. Story*, 108 Mass. 382. *Elliot v. Fessenden*, 83 Maine, 197. The attempted designation of the claimant as a beneficiary must be regarded therefore as invalid.

Neither do we think that within any fair construction of the words she can be considered a dependent upon him. He contributed no more to her support than any one of the other boarders whom her mother took, and, as matters stood, he was under no legal obligation to support her. In no just sense can there be said to have been directly or indirectly a relation of dependency between the child and its putative father. See *McCarthy v. New England Order of Protection*, 153 Mass. 314; *Elssey v. Odd Fellows Relief Association*, 142 Mass. 224.

The association admits that either the plaintiff or the claimant is entitled to the fund. For the reasons which have been given we think that the claimant is not entitled to it. It follows that the plaintiff is entitled to it.

Judgment affirmed.

DAVID W. CALVIN *vs.* SAMUEL R. HUNTLEY.

JOSEPH TREU *vs.* SAME.

Bristol. October 22, 1900. — February 27, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & HAMMOND, JJ.

U. S. Rev. Sts. § 4527 providing, that a seaman discharged before one month's wages are earned, without fault on his part and without his consent, shall receive in addition to any wages he may have earned a sum equal in amount to one month's wages as compensation, does not impose a penalty or forfeiture, but establishes a rule of damages for breach of contract, and the State court has jurisdiction of an action at common law to recover such compensation.

TWO ACTIONS OF CONTRACT against the owner and master of the coasting schooner William J. Lipsett, each to recover a sum equal in amount to one month's wages, in addition to wages earned by the plaintiff at the time of his alleged wrongful discharge by the defendant. Writ dated August 10, 1899.

The declaration in each case alleged, that the plaintiff shipped at Philadelphia on August 1, 1899, for a coasting voyage between the port of Philadelphia and the port of New Bedford, and by the shipping articles bound himself to serve upon the schooner William J. Lipsett, of which the defendant was owner and master, for the term of two months, as seaman at the wages of \$25 per month and board or provisions and lodgings on board of said schooner; that the plaintiff entered upon the performance of his agreement and continued therein, until the schooner reached the port of New Bedford, and was ready and willing to continue in the performance of his agreement, but the defendant wrongfully refused to suffer or permit the plaintiff to continue in the performance of his agreement, and wrongfully discharged him at New Bedford, on the 8th day of August, and compelled him to leave the schooner. The claim in each case was for \$6.66 earned as wages up to the time of discharge, \$25 for a sum equal in amount to one month's wages, and \$16 for board and lodging, making \$47.66 in all.

The claim to recover a sum equal in amount to one month's wages was based upon U. S. Rev. Sta. § 4527, which provides that "Any seaman who has signed an agreement and is afterward discharged before the commencement of the voyage or before one month's wages are earned, without fault on his part justifying such discharge, and without his consent, shall be entitled to receive from the master or owner, in addition to any wages he may have earned, a sum equal in amount to one month's wages as compensation, and may, on adducing evidence satisfactory to the Court hearing the case, of having been improperly discharged, recover such compensation as if it were wages duly earned."

In the Superior Court, the defendant in each case filed a motion to dismiss for want of jurisdiction, on the ground that the subject matter and form of suit were in the nature of admiralty, of which the United States courts have exclusive jurisdiction. The Superior Court allowed the motions and dismissed both cases for want of jurisdiction. The plaintiffs appealed to this court.

T. F. Desmond, for the plaintiffs.

E. D. Stetson, for the defendant.

HAMMOND, J. In each of these actions the plaintiff, a seaman, seeks to recover against the master of the vessel the wages earned by him up to the time of his discharge, and in addition thereto a sum equal in amount to one month's wages, as provided in U. S. Rev. Sts. § 4527. The cases are before us on appeals from a judgment of the Superior Court dismissing them for want of jurisdiction.

While a seaman may maintain a libel in the admiralty court for his wages, he can also maintain at his election an action at common law against the master or owner of the vessel. *Temple v. Turner*, 123 Mass. 125, 128, and cases there cited. *Smith v. Oakes*, 141 Mass. 451, 454. *Leon v. Galceran*, 11 Wall. 185. Such an action is within the exception named in U. S. Rev. Sts. § 4547, that "nothing herein contained shall prevent any seaman from maintaining any action at common law for the recovery of his wages."

It is also well settled that civil cases arising under the Constitution and laws of the United States may be tried and determined in the State courts unless the national Constitution or laws have vested exclusive jurisdiction of them in the federal courts. *Crocker v. Marine National Bank*, 101 Mass. 240. *Clafin v. Houseman*, 93 U. S. 180, 186.

But it is urged that this is an action to recover a forfeiture or penalty within the meaning of U. S. Rev. Sts. § 711, cl. 2, which provides that the federal courts shall have exclusive jurisdiction "of all suits for penalties and forfeitures incurred under the laws of the United States."

Section 4527, which applies to this action, is as follows: "Any seaman who has signed an agreement and is afterward discharged before the commencement of the voyage or before one month's wages are earned, without fault on his part justifying such discharge, and without his consent, shall be entitled to receive from the master or owner, in addition to any wages he may have earned, a sum equal in amount to one month's wages as compensation, and may, on adducing evidence satisfactory to the court hearing the case, of having been improperly discharged, recover such compensation as if it were wages duly earned."

It is to be observed that the language of the section is not that ordinarily used in a penal statute. Neither the word "penalty"

nor "forfeiture" is in it. Moreover it does not provide punishment for the commission of a criminal offence nor for the neglect of a statutory duty, nor even for the neglect of a duty in the performance of which the public as such may be supposed to have an interest. It speaks not of punishment but of compensation, its object is to protect the seaman from loss rather than to punish the master for discharging him. The remedy is given to the seaman alone, and its plain purpose is to furnish a clear and well defined rule of damages as between him and the master for a breach of contract in which the seaman and the master or owner are the only persons interested.

The statute, being the law of the jurisdiction where the contract was made, is the law with reference to which the parties must be presumed to have contracted, or in other words it is the law of the contract, and it is as much a part of the contract as though inserted therein.

Nor does the rule of damages seem unreasonable. The shipping contract calls upon the seaman to go to various places, sometimes far from home, and it may be, for instance as in this case was the actual fact, that he may be discharged in a port distant from that where he signed the articles, or where he cannot immediately secure any other employment on board ship or elsewhere, and that in all fairness he should recover more than the amount due him for wages earned. Hence it might be deemed advisable to have this indefinite element made definite by a general law with reference to which the parties may conclusively be presumed to have contracted, and which therefore should be taken to be the law of the contract. The object of the statute is not to punish but to provide a reasonable rule of compensation for a breach of contract. We think the statute not penal but remedial. It follows that the State court had jurisdiction.

Judgment dismissing actions reversed.

PATRICK WHALEN vs. MYRON L. WHITCOMB & another.

Essex. November 7, 1900. — February 27, 1901.

Present: HOLMES, C. J., KNOWLTON, LATHROP, BARKER, & HAMMOND, JJ.

In an action by an employee in a shoe factory to recover from his employer for injuries caused by his foot slipping in a depression in the concrete floor of a passage between two machines, it appeared that the plaintiff had been at work in the room where the accident occurred for six months, and for the two weeks preceding the accident was employed on work that required him to pass over this passage every day and it might be many times a day. The depression was filled with leather dust of a darker color than the concrete and appeared to have existed at the time the plaintiff entered the employ of the defendant and continuously until the time of the accident. *Held*, that the risk of injury from this defect was obvious and was assumed by the plaintiff.

TORT to recover for personal injuries received by the plaintiff while in the employ of the defendants by reason of one of his feet slipping into a depression in the concrete floor of the defendants' shoe factory, causing him to strike his knee against the wheel of a dieing out machine. Writ dated July 29, 1898.

At the trial in the Superior Court, before *Bishop, J.*, evidence was presented of which the substance is stated in the opinion of the court. A dieing out machine is used to cut out with a die pieces of leather to be used in making shoes.

At the close of the evidence, the jury by order of the judge returned a verdict for the defendants; and the plaintiff alleged exceptions.

H. J. Cole, (*W. S. Peters* with him,) for the plaintiff.

C. A. DeCourcy & *J. H. Pearl*, for the defendants.

HAMMOND, J. While passing over a passageway three feet in width between two dieing-out machines the plaintiff slipped upon the edge of a depression varying in depth from one and a half to three inches in the concrete floor of the passageway, his knee struck against a wheel upon one of the machines and he was injured. At the time of the accident he was about fifty years of age. He had been at work in this room more or less for more than six months, and for at least two weeks immediately preceding the accident his work had been of such a character as to make it necessary or convenient for him to pass

over this way every day and "it might be a great many times a day."

A civil engineer called by the plaintiff testified, from actual measurements made by him, that the depression extended out into the passageway from four to ten inches and was "a little rounding on the edge and then dropped down." It also appeared that the depression was filled with leather dust of a darker color than the concrete. The evidence tended to show that the depression existed at the time the plaintiff first entered the employ of the defendants, and had so continued up to the time of the accident, and the plaintiff made no contention to the contrary. There was some question as to light, but it is plain that upon this evidence the jury would not be warranted in finding that the place was dark enough to obscure materially the view.

Taking into consideration the nature of this defect, the frequency with which the plaintiff passed over or near it and the fact that it had existed during the whole time of the plaintiff's employment, we think that the plaintiff assumed, as one of the obvious risks of his employment, the risk of injury arising from it. The case is plainly distinguishable from *Hogarth v. Pocasset Manuf. Co.* 167 Mass. 225, and *Johnson v. Field-Thurber Co.* 171 Mass. 481, upon which the plaintiff relies, and must be classed with *Murphy v. American Rubber Co.* 159 Mass. 266; *Rooney v. Sewall & Day Cordage Co.* 161 Mass. 153; *Kleinest v. Kunhardt*, 160 Mass. 230; *Nealand v. Lynn & Boston Railroad*, 173 Mass. 42; *Hoard v. Blackstone Manuf. Co.* 177 Mass. 69, and similar cases.

Exceptions overruled.

PATRICK E. SULLIVAN vs. SIMPLEX ELECTRICAL COMPANY.

Suffolk. November 13, 1900. — February 27, 1901.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

The danger to an employee in a rubber factory feeding rubber into a machine to be pressed between two revolving cylinders of having his hand caught between the rollers is an obvious one, and the employer need not instruct a boy of nineteen how to avoid it. An instruction to the boy, that if the scraps of rubber did not come down he should push them with his left hand, did not justify him in thinking that he could do this without running the risk of getting his hand caught.

TORT by a boy employed in a rubber factory to recover damages from his employer for injuries sustained while engaged in feeding rubber into a machine to be pressed between two revolving cylinders. Writ dated June 11, 1898.

The declaration contained four counts, the first three under the employers' liability act, and the fourth at common law. The common law count alleged a failure to warn the plaintiff of the dangers of the machine on which he was at work, and to instruct him as to the proper and safe manner in which the work intrusted to him should be done.

At the trial in the Superior Court, before *Sherman, J.*, it appeared, that the plaintiff was injured on May 7, 1898. He testified that he was nineteen years old on June 12, 1897. One Montague, who was an operator in the defendant's factory, had charge of the machine by which the plaintiff was injured. The character and use of the machine are described in the opinion of the court. The plaintiff gave the following account of the happening of the accident:

"He [Montague] said, 'Have you got any of that scrap rubber left?' I said, 'Yes, sir.' He says, 'You go down stairs and feed it into the mill.' I said, 'I don't know how to do that; I never done it before.' He said, 'You go down stairs and you roll those scraps up in a roll, and you pick them up off the floor and you walk around the mill, between the bench and the mill, and put the scraps on there, and hold your right hand underneath the rolls to catch them when they come through, and

bring them up around on the rolls, and let them go around like that till I come down. I will be down soon and then I will show you what to do next on the machine.' Then he said, 'If those scraps don't come down through the rolls then, you push them down with your left hand.' I mean by the word 'rolls' cylinder or roller. I came down stairs, went over to this mill where he sent me and I did as he told me, rolled these scraps in a roll, took them up and walked around where he told me to go, in between this bench and the mill, and put the rubber on there, scrap rubber, and I held my right hand underneath the rolls for quite a little while, and they did n't seem to come through then, so I pushed them down with my left hand, and in pushing them down my hand went in with the rubber."

On cross-examination the plaintiff testified as follows: "I knew at that time that if the rubber did n't come down through the rolls at all there would be no occasion to have my hand there. I rolled the rubber up in a rough roll that was probably six inches thick. I put that roll between the revolving cylinders. I saw these revolving. I noticed that the roll of rubber did n't go down through. I knew that the rubber was going to go through when I pushed it. If I had n't pushed it, I knew that there was no rubber coming down between the cylinders, and I knew there was nothing there to get hold of with my right hand at that time. I knew that if the space between the two rolls had been larger than the rubber it would have dropped right down through, and I knew that the reason it did n't go down through was because the roll was bigger than the space between the two cylinders. I knew that the roll of rubber was a big roll. I pushed it so as to have it go through. I pushed it because Mr. Montague told me to push it. He told me to push it so as to have it go through. If I had n't pushed it I don't think it would have gone through. I knew that if the space between those two cylinders was one inch, that a roll of rubber which was two inches thick would have to be pushed to go down through. I knew that when the rubber once caught between the two cylinders it would go down itself. I knew that if my fingers were with the rubber they would go down with it. I knew that when I put the rubber between the cylinders and it went down through it would be somewhat squeezed. When I

put it on I realized that it did n't go through. I knew at that time that the cylinders were revolving, and I pushed the rubber for the sake of getting it caught between the two cylinders so that it would go down through, and I put my hand on it for that purpose. I pushed my hand down in the direction of the centre of the two cylinders or the middle of the two cylinders, as they were coming together. My hand was on top of the rubber. There was nothing to conceal any part of the cylinders in the way of a hood, or any other piece of machinery or anything of that kind. While I was stooping I was looking at my hand that was pushing the rubber in. My stooping did not in any way interfere with my seeing where my hand was. I could see I was pushing the rubber down through and in what direction I was pushing and the cylinders revolving. My hand was right over the rubber, on top of the rubber. I put the rubber in lengthwise. I put my hand right over the roll of rubber and pushed the rubber right down between the two revolving cylinders. I could see I was pushing the rubber down, and I was pushing it down for the purpose of having it catch between the cylinders and go down between. I was pushing the rubber through to bring it around the other roll. I knew that the roll of rubber would flatten when going through between the cylinders, and I knew that was by the pressure of the two cylinders together on the rubber as it went down through."

At the close of the evidence, the judge ruled, at the request of the defendant, that the action could not be maintained, and by his direction the jury returned a verdict for the defendant. At the request of the plaintiff, the judge reported the case for the consideration of this court.

If the ruling was wrong, the verdict was to be set aside and a new trial ordered; otherwise judgment was to be entered on the verdict.

P. M. Keating, for the plaintiff.

C. S. Knowles, for the defendant.

HAMMOND, J. The plaintiff was put to work at a machine where there were two iron or steel cylindrical rolls, each two feet in diameter and three feet long, set side by side in a horizontal position, parallel to each other, and revolving in opposite directions at different rates of speed. The bottom of each roll

was two feet above the floor and the top of each four feet above it. The machine was used to press out scrap rubber and work into the rubber certain other substances. The distance between the rolls when in operation varies from one eighth to three quarters of an inch. The rubber is put between and on top of the rolls while they are in motion, and as it comes out below them is caught by the operator, who lays it on and around one of the rolls, where it is allowed to revolve while other substances are added to complete the composition. The operation lasts at least several minutes. If the rubber when put on the rolls does not go down by itself the operator pushes it down with his hands. As a general rule it is pushed with the tips of the fingers of both hands.

In the early afternoon of the day of the accident, the plaintiff, who had never worked at such a machine before, was told by one Montague to go down stairs and feed scrap rubber into this machine. The plaintiff replied saying he had never done that and did not know how to do it. Thereupon Montague instructed him how to roll up the scraps of rubber and put them on the rolls, and then said: "Hold your right hand underneath the rolls to catch them when they come through, and bring them up around on the rolls and let them go around like that till I come down. I will be down soon and then I will show you what to do next on the machine." He then added: "If those scraps don't come down through the rolls then, you push them down with your left hand."

Under these circumstances the plaintiff went down stairs, rolled up the scrap rubber, placed it upon the rolls as directed, and held his right hand under the rolls "for quite a little while"; as the rubber did not seem to come through, he pushed it down with his left hand, and while in that act his hand was caught between the rolls and crushed.

There was no trouble with the rolls, and the accident is not attributable to any defect in their nature or operation. There was a pan upon the floor for the reception of the compound which fell between the rolls during the mixing of the rubber. This pan projected beyond the rolls about a foot toward the front, and prevented the plaintiff from seeing exactly how far apart the rolls were, but he could see that they were very near

together. He had seen Montague work at the machine, had seen him put material between these two rolls on at least three different occasions, had seen that the rubber had been "squeezed together" by going between them, and he expected that such would be the result. He knew that if the rubber once caught between the rolls it would go down, and that if his fingers were there with the rubber they would go with it. In short, he knew that he was at work upon revolving rolls which could not be far apart, although he could not see down to the place where the revolving surfaces came nearest to each other; and he knew that if the rolls were close enough together there was danger of getting his hand pinched. He had been at work several weeks in the factory, and near revolving wheels and rolls, although not at any machine, except that for two weeks prior to the accident he had been assisting Montague upon a machine called a calender. This machine had three rolls of hard material like iron or steel, of about the same size as those at which the accident occurred, placed one above the other. The plaintiff's duty there was to sit down and keep the material, which was very thin and about two feet wide, coming through these revolving rolls from creasing as it came off the rolls.

The danger of having one's hand injured if caught between revolving rolls is an obvious danger, and the mere fact that the operator cannot tell the exact degree of the danger if the nature and character of it can be easily seen is not enough to require warning and instruction to a boy of the age of the plaintiff and of ordinary intelligence; and the case must stand in the same class with *Stuart v. West End Street Railway*, 163 Mass. 391, *Lowcock v. Franklin Paper Co.* 169 Mass. 313, and similar cases.

Nor is the case changed by the fact that the plaintiff was told if the rubber did not go down itself he should press it down with his fingers. The fair interpretation of the instruction was that he might use his fingers for the purpose of pressing down the rubber, but we do not think he was justified in thinking that he was safe in doing that without regard to the peril incidental to such an operation, or that he was thereby relieved from the duty of seeing to it that his hand did not go too far down.

Judgment on the verdict.

PATRICK J. CORRIGAN vs. PEOPLE'S BUILDING, LOAN, AND
SAVING ASSOCIATION.

MARY CORRIGAN vs. SAME.

Bristol. December 4, 1900. — February 27, 1901.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

A pretended forfeiture of membership falsely set up by a loan and saving corporation, as a reason for not complying with a demand for certain payments alleged by a shareholder of five years standing to be due to him under the terms of his certificate, does not justify such shareholder in rescinding his contract under which he has made monthly payments during the five years, and his only remedy is on the contract; and if the corporation was organized in another State and the certificate provides that any action brought by a shareholder against the corporation shall be brought in that State, there is no remedy here.

TWO ACTIONS OF CONTRACT, the first count of each declaration declaring on a promise alleged to be contained in the certificate of the defendant for five shares therein held by the plaintiff as stockholder to pay the plaintiff \$100 for each share in five years from the date of the certificate or at the maturity thereof; and the second count of each declaration declaring on an account annexed to recover sixty monthly payments of \$5 each and twenty quarterly payments of \$1.25 each made by the plaintiff to the defendant, in the case of Patrick J. Corrigan between March 1, 1890, and February 28, 1895, and in the case of Mary Corrigan between April 1, 1890, and March 31, 1895. Writs dated February 9, 1900.

The only difference between the declarations in these cases and that in *Daley v. People's Building, Loan & Saving Association*, ante, 13, was that in the contract here alleged the words "or at the maturity thereof" were added after the alleged promise to pay the plaintiff \$100 for each share in five years from the date of the certificate.

At the hearing in the Superior Court, before *Pierce, J.*, it appeared that the certificates were in the following form, the words printed in italics being those which were not contained in the certificate held by Daley, ante, 13: "This is to certify that

Patrick J. Corrigan of Fall River, State of Massachusetts, is hereby constituted a shareholder in The People's Building, Loan and Saving Association, incorporated under the laws of the State of New York, and holds five shares therein of One Hundred Dollars each, and in consideration of the entrance fee, together with agreements and full compliance with the Terms and Conditions printed on the back of this Certificate, and the Articles of Association and By-Laws adopted by the said Association, all of which are hereby referred to and made a part of this contract, the said The People's Building, Loan and Saving Association agrees to pay said Shareholder, or his heirs, executors, administrators or assigns, the sum of one hundred dollars for each of said shares, at the end of five years from the date hereof, *or at maturity*; or, in case of the death of the holder of this certificate before the expiration of said term, then a sum of money equal to the amount of monthly installments paid on said shares together with all dividends accrued thereon; *or the holder of the within certificate may surrender the same to the Association at any time after two years from the date hereof, and receive therefor a certificate of paid-up shares for as many shares as the amount credited to such certificate will purchase at the rate of \$60.00 per share*; all of which are payable in the manner and upon the conditions set forth in the articles of association and by-laws of the association and terms and conditions printed on the back of this certificate. Given under the seal of said Association, at Geneva, N. Y., this first day of March, 1890."

The Terms and Conditions printed on the backs of the certificates were the same as those upon the certificate of Daley, including the eleventh condition that "Any action brought against this Association by any Shareholder shall be brought on or before six months after filing his proofs, and in the County of Ontario, State of New York."

On February 12, 1894, Mary Corrigan, through an agent, asked for information as to how she could cancel these shares or withdraw her deposits. The defendant replied that her certificate was not withdrawable until maturity. That, however, it could be changed, if desired, "from running stock into paid up stock," and the defendant would issue to her as many shares of paid up stock as the amount standing to her credit would purchase at

\$60 per share, and that no further payments would have to be made upon the paid up stock after the first instalment.

On March 6, 1895, Patrick J. Corrigan, through the same agent, made application for the withdrawal of his shares which he stated to have been running for five years and to be then due. The defendant replied that his certificate was not withdrawable until maturity, stating: "This means that you must continue the payments until the amount paid into the Loan Fund with the accrued dividends equals the par value of the shares, unless you wish to exchange it for paid up stock. The amount now to the credit of the certificate is \$354.75 which would purchase five and three fourths shares of paid up stock worth \$345, and leave a balance due you of \$9.75 for which check would be sent you with the new certificate."

At the beginning of January, 1896, the plaintiffs were informed by the defendant's agent in Fall River that their stock had been forfeited and they were no longer members of the defendant association.

On June 2, 1897, the defendant wrote to the plaintiffs' counsel that the plaintiffs' certificates "were forfeited long ago for non-payment of dues, they therefore have no standing on the books of the Association at present."

In answer to interrogatories filed after the suits were brought, it was admitted by the defendant that the plaintiffs' stock was not forfeited.

The defendant contended that the plaintiffs could not recover, upon the ground that the court had no jurisdiction of the actions; also upon the ground that there were no funds on hand in the defendant's treasury applicable to the payment of the plaintiffs' claims, when this action was brought; and also upon the ground that on all the facts the plaintiffs were not entitled to recover.

At the close of the evidence, at the request of the defendant, and against the objection of the plaintiffs, the judge ruled that the plaintiffs could not recover; and at the request of the parties reported the cases for the consideration of this court, with the agreement that if a jury would be warranted in finding for the plaintiffs then judgment was to be entered for each plaintiff as of September 12, 1900, for \$429 with interest from the date of

the writ, or in case the plaintiffs could recover only the book value of their stock for \$276.50 each, with interest from the date of the writ; otherwise judgment was to be entered for the defendant.

J. W. Cummings & C. R. Cummings, for the plaintiffs.

C. M. Elliott, (of New York,) for the defendant.

HOLMES, C. J. In these cases there had been no previous trial, or election to sue on the covenant, and it was understood that the plaintiffs might recover the withdrawal or book value of their stock irrespective of the pleadings, if they were entitled to that upon the facts. In other respects the cases are like *Daley v. People's Building, Loan & Savings Association*, ante, 13, and are governed by it.

If we assume that the jury would have been warranted in finding that when the plaintiffs sought to withdraw the defendant made false pretences and set up a forfeiture knowing that it had no right to do so, still in our opinion there was no right to rescind and the only remedy was on the contract under which the plaintiffs had been members of the company for five years.

Judgment for the defendant.

WILLIAM WHITWORTH vs. ALFRED S. LOWELL.

Worcester. December 5, 1900. — February 27, 1901.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

Objections to a master's report not perfected as exceptions in accordance with Chancery Rule 82 of the Superior Court are not open for consideration.

Chancery Rule 82 of the Superior Court provides that exceptions to the report of a master shall be filed with the clerk and notice thereof given to the adverse party, and that in every case the exceptions shall briefly and clearly specify the matter excepted to, and the cause thereof. This rule is not complied with by filing objections to a master's report and to findings of the master and requests for findings and rulings, and then alleging that the objecting party excepts to so much of the master's report as is inconsistent with his objections and his requests for findings and rulings which are appended to the master's report.

In a suit in equity to reform a contract to furnish steam piping for a building of five floors, it appeared that the plaintiff was invited to bid for the contract and to "Make price on piping without tanks and elevator pumps and with" and to

"Make price on complete plant" and to "Make price on plant without heating system above the second floor." The plaintiff made a bid as follows: "For the whole building, \$3,719; for the building below the three top floors, \$2,854; and without the tanks and pump, \$2,260." The defendant then drew a form of offer, which the plaintiff signed, and also the defendant, as follows: "I propose to install in your new building a complete system of piping in accordance with the plans and specifications. The price for the above is \$2,260. I further agree to install all work above the second floor for the sum of \$965, this sum being deducted from the total cost for the whole building, if not done." The plaintiff sought to have this contract declared ambiguous, and to have it reformed in accordance with his construction of his original bid. *Held*, that the original bid was ambiguous and the contract as signed was not, but meant that the plaintiff would do the piping of the entire building for \$2,260, and would do it without the three upper floors for \$965 less, making the price for the piping of the two lower floors \$1,295.

BILL IN EQUITY to reform a contract for steam piping a building of the defendant in Worcester, filed August 15, 1898.

The bill alleged, that previous to January 28, 1898, the defendant furnished the plaintiff with certain specifications, a copy whereof was annexed marked "A," for steam piping in a building at the corner of Foster and Norwich Streets in Worcester, which the defendant was then erecting, and requested the plaintiff to make prices therefor according to certain specifications; and thereafter, on January 28, the plaintiff submitted to the defendant a written statement, a copy of which was annexed marked "B," wherein he gave prices for said steam piping as follows: "For the whole building, \$3,719; for the building below the three top floors, \$2,854; and without the tanks and No. 8 Worthington pump, \$2,260"; that the defendant decided to put in at that time the piping below the three top floors without the tanks and the Worthington pump, and to leave the installation of the work on the three top floors open for future consideration, and on February 8, 1898, the defendant himself or through his agents, drew up a proposition or agreement in writing, a copy whereof was annexed, marked "C," for the plaintiff to sign, which proposition or agreement the plaintiff and defendant both signed.

The specifications marked "A" contained the following: "Steam piping for A. S. Lowell, Worcester, Mass. The piping as shown on plan is as follows: [Here followed specifications of the piping required.] Make price on piping without tanks and elevator pump and with. [Here followed specifications for

tanks and elevator pump.] Make price on complete plant. Make price on plant without heating system above the second floor."

The plaintiff's bid of January 28, 1898, marked "B," was as follows:

"Piping for the A. S. Lowell Block, Worcester, Mass. We, the undersigned Whitworth Heating Co., agree to put in the piping, valves, pumps and all connections as shown on plans. [Here followed an enumeration of the piping and appliances to be furnished.]

"Without the three top floors, \$2,854.00.

"Without the tanks and No. 8 Worthington pump \$2,260.00. The above price include the whole system with the exception of the automatic valve for pressure tank which I have not been able to find."

The document marked "C," which was signed by the parties and became the contract, was as follows:

"Worcester, Mass., Feb. 8, 1898. Mr. A. S. Lowell, Worcester, Mass. Dear Sir: We propose to install in your new building, corner of Foster and Norwich Streets, a complete system of piping for power and heating purposes, in strict accordance with plans and specifications furnished by Lewis & Claflin, and further agree to forfeit the sum of \$10 per day for each day after March 10, 1898, that the work necessary for the occupancy of the building is delayed, provided circumstances beyond our control do not interfere.

"The price for the above is twenty-two hundred and sixty dollars (\$2,260.00).

"We further agree to install all work above second floor any time previous to September 1, 1899, for the sum of nine hundred and sixty-five dollars (\$965.00), this sum being deducted from the total cost for the whole building, if not done.

"It is hereby understood and agreed that this last proposition is to be subject to any changes in the price of stock which may occur between the present date and September 1st, 1899. Respectfully submitted, Whitworth Heating Co., Wm. Whitworth, Treas. A. S. Lowell."

The bill further alleged, that in the first clause of said proposition or agreement either by accident, mistake, or by fraud on

the part of the defendant or his agents, the work and materials to be performed and furnished by the plaintiff were not limited and confined to the building below the three top floors as was intended by the plaintiff as the defendant or his agents then well knew, and as appears also in the third clause of said proposition or agreement; that the plaintiff performed the work and furnished the material for piping for power and heating purposes in said building except in the three top floors in accordance with the specifications and his agreement, and the defendant paid him on account thereof the sum of \$1,000, leaving the sum of \$1,260 still due the plaintiff thereon, but that the defendant now contends that the \$965 for future work should be deducted from the \$2,260 instead of from the \$3,719, the price for the whole building, and that he only owes the plaintiff thereon the sum of \$295.

The plaintiff prayed that the first clause of said agreement might be reformed by inserting after the word "purposes" in the third line thereof the following words "below the three top floors," or in some other way to make it conform to the intention of the parties thereto at the time it was executed, and prayed for an enforcement of the contract as reformed.

In the Superior Court the case was referred to a master who reported as follows:

"First. In the month of January, 1898, the plaintiff and the defendant had a conversation in relation to the plaintiff's installing a heating plant in a building then being erected by the defendant in the City of Worcester. After some discussion of the subject, the defendant referred the plaintiff to his engineers, Lewis & Clafin, of Providence, Rhode Island, under whose supervision the building was being erected. Subsequently, W. B. Lewis, of the firm of Lewis & Clafin, sent or gave to the plaintiff a paper containing the specifications in regard to heating the defendant's building, of which a copy was annexed to plaintiff's bill, marked 'A.'

"Second. On or about January 28, 1898, the plaintiff gave or sent to said Lewis, an unsigned proposal or agreement, concerning the said heating, a copy of which was annexed to the plaintiff's bill and marked 'B.' Between the time of the first conference between the plaintiff and defendant, and February 8,

1898, the plaintiff and Lewis had several conversations relating to installing the heating plant, but no definite agreement or understanding in relation thereto, was reached before February 8, 1898. A few days before February 8, 1898, the plaintiff was informed by one Parker, acting for Lewis, that he, Lewis, had decided to give him the job on the bid, and to go to work on it, and that he would be up in a few days and fix up the contract. The plaintiff thereupon began and worked three or four days on the job, before February 8, 1898.

"Third. On February 8, 1898, Lewis drew up in writing, an agreement for the plaintiff and defendant to sign, a copy of which agreement is annexed to plaintiff's bill, marked 'C,' excepting the following words, — 'providing circumstances beyond our control do not interfere.' Lewis gave this agreement to the plaintiff to read and consider. The plaintiff, after reading the agreement, expressed a desire to have incorporated into it the provision, — 'Providing circumstances beyond our control do not interfere.' Lewis assented to this, and the plaintiff thereupon took the agreement to a typewriter, and after the insertion of the above provision, had the same set in type.

"The plaintiff then signed the agreement marked 'C' and took it to the defendant, who also, after reading it, signed it. I find that the defendant never saw the specifications 'A' nor the unsigned agreement 'B' until this hearing, and that the only paper or agreement he had any knowledge of, was the contract 'C' signed by him.

"Fourth. I find that the plaintiff had opportunity to fully consider and understand the terms of said agreement 'C.' I do not find that said Lewis practised any deception or fraud in obtaining the plaintiff's signature to said agreement.

"Fifth. I find that after the plaintiff had put in some portion of the heating plant, and long before the work was completed, the plaintiff was suspicious that the agreement was not what he thought it was, at the time of signing it, and a doubt arose in his mind as to whether the sum of \$965 was to be deducted from \$2,260, or added to that sum in case the three top floors were furnished with heating appliances. The plaintiff did not inform the defendant, or Lewis, of his doubt or suspicion, but continued on in the work of installing the plant, assuming that the contract

meant that the \$965 was not to be deducted from the \$2,260, but to be added thereto in case the three top floors were furnished with heating appliances.

"Sixth. The plaintiff after the signing of said agreement, proceeded with the work contemplated, and furnished material and work for heating purposes in said building, except in the three top floors, substantially in accordance with the specifications and agreement.

"Seventh. After the completion of the heating plant, the plaintiff called upon the defendant for a settlement of the account, stating that he understood that he was to receive \$2,260 for installing the plant on the two lower floors. The defendant denied this construction of the contract, and contended that the contract was for \$2,260, less \$965, for the three top floors, which had not been furnished with heating apparatus.

"Eighth. I find that the plaintiff supposed, at the time he signed contract 'C,' that he was to receive \$2,260 for installing the heating plant on the two lower floors, and that he was mistaken in the meaning and purport of the agreement 'C.'

"Ninth. The evidence fails to satisfy me that either the defendant, or the defendant's engineer Lewis, understood that the agreement was for \$2,260 for the two lower floors.

"Tenth. I therefore find that the failure to limit or confine the contract price of \$2,260 to the two lower floors, was not an accident, was not procured by fraud, and was not a mutual mistake of the parties to the contract.

"Eleventh. Upon the foregoing findings of fact, I rule as a matter of law, that the plaintiff is not entitled to have said contract 'C' reformed; and that the defendant is entitled to have the \$965 deducted from the \$2,260, leaving the sum of \$1,295 as the amount the plaintiff is entitled to receive under agreement 'C.'"

The other findings are not material to the case as now presented.

The master also reported as follows: "Before making a rough draft of the report the plaintiff's and defendant's counsel filed with me requests for findings and rulings, which requests accompany this report. Having made a rough draft of the report, I notified the respective counsel thereof, and subsequently heard their suggestions and requests as to my final draft. I thereupon

made the foregoing final draft of the report, and gave notice thereof to the respective counsel on December 29, 1899. On the first day of January, 1900, the plaintiff's counsel filed with me his objections to my report, which objections accompany this report."

The plaintiff's objections to the master's report and his requests for findings and rulings were appended to the master's report as stated in the opinion of the court.

The master's report was filed January 5, 1900, and on January 10, 1900, the plaintiff filed the following statement: "Now comes the plaintiff and excepts to so much of the master's report as is inconsistent with the plaintiff's objections and his requests for findings and rulings, which objections and copies of the requests are appended to the master's report."

The case was heard in the Superior Court by *Pierce, J.*, who entered a decree as follows: "1. That the objections to the master's report be and hereby are overruled. 2. That the master's report be and hereby is accepted and confirmed. 3. That the exceptions to the master's report be and hereby are overruled. 4. That it appearing as a matter of record that this court upon the defendant's motion awarded the plaintiff his costs, and the same were taxed by the clerk pursuant to the order, to January 11, 1900, and it appearing that on that date the defendant tendered and brought into court for the plaintiff the amount found due the plaintiff by the master's report, together with interest thereon to January 11, 1900, and also that the defendant on that date tendered and brought into court for the plaintiff, the plaintiff's taxable costs as decreed by the court to January 11, 1900, and that the plaintiff received and accepted said sums so tendered and brought into court, now therefore it is ordered that the defendant be awarded the taxable costs from January 11, 1900."

From this decree the plaintiff appealed.

B. W. Potter, for the plaintiff.

E. H. Vaughan, for the defendant.

LOBING, J. This case comes up on an appeal from a decree of the Superior Court, overruling the plaintiff's objections to the master's report, accepting and confirming the report, overruling the exceptions to the report, and allowing to the defendant taxable costs after the date when he paid to the plaintiff the sums found by the report to be due from him.

The decree should not have undertaken to deal with objections to the report. The only purpose served by them is to lay the foundation for exceptions to the report; unless perfected by exceptions founded on them, they give to the party making them no standing in court to contest the master's report.

The only exception or exceptions filed by the plaintiff were as follows: "Now comes the plaintiff and excepts to so much of the master's report as is inconsistent with the plaintiff's objections and his requests for findings and rulings, which objections and copies of the requests are appended to the master's report." Accompanying the report are, first, a paper containing four requests for findings of fact and four requests for rulings on the law and the evidence; second, a paper in the form of a letter to the master, asking him to draw certain inferences from the evidence; and, third, a paper containing seven objections, and in the seventh objection there are contained three requests for findings and two objections to the master's having failed to make two findings there specified. This is not a compliance with Chancery Rule 82 of the Superior Court, and there were no exceptions properly before that court.

But there is no error shown in the points urged by the plaintiff at the argument and on his brief, and he has lost no rights by failing to put them in the proper form.

1. The first point made by the plaintiff is that the master was wrong in making the finding of fact that the defendant never saw the specifications nor the unsigned bid of the plaintiff, Exhibit B, until the hearing before the master, and that the only paper or agreement he had any knowledge of was the contract, Exhibit C. There is nothing in the deposition of the defendant's engineer Lewis, which is the only evidence before the court which shows that this finding was not warranted. There is no inconsistency between this finding and the fact which appears from the contract between the defendant and Lewis, the engineer, that the defendant had approved specifications for heating the building. The finding is that the specifications submitted to the plaintiff that he might make a bid on the work had not been seen by the defendant. Whether they were an exact copy of the specifications, approved by the defendant, or not, does not appear, and is immaterial. What is material is that so far

as the defendant's knowledge went, the paper "C" contained the agreement. The argument that Lewis was acquainted with Exhibits A and B, and the defendant is bound by his knowledge, is disposed of by the master's ninth finding: "The evidence fails to satisfy me that either the defendant, or defendant's engineer Lewis, understood that the agreement was for \$2,260 for the two lower floors," and the finding that the plaintiff had opportunity "to fully consider and understand the terms of said agreement 'C.' I do not find that said Lewis practised any deception or fraud in obtaining the plaintiff's signature to said agreement." We cannot say that these findings were not warranted by the evidence. This disposes of the plaintiff's second point also.

2. The third point is that the master was wrong in finding that the plaintiff did not prove that either the defendant or the defendant's engineer, Lewis, understood the agreement was for \$2,260 for the two lower floors, and in the finding that the failure to limit the price of \$2,260 to the two lower floors was not an accident, was not procured by fraud, and was not a mutual mistake of the parties to the contract. The plaintiff's bid was ambiguous; he had been requested to "Make price on piping without tanks and elevator pump and with" also to "Make price on complete plant" and "Make price on plant without heating system above the second floor." There is nothing on the face of the plaintiff's bid to show whether \$2,260, which was the plaintiff's price "without the tanks and No. 8 Worthington pump," was his price for the whole building or for the building "without the three top floors." It was stated distinctly in the agreement "C" which the plaintiff had ample opportunity to study, that this was the price from which \$965 was to be deducted if the system was not put in on the three top floors. We are of opinion that there is nothing in Lewis's deposition which prevented the master from making this finding.

3. The plaintiff's next point is that the master should have ruled, as a matter of law, that the agreement which was signed, Exhibit C, was ambiguous. On the contrary, we think that the agreement was not ambiguous, and that the plaintiff's bid, Exhibit B, which he wishes to have considered in determining the true construction of the unambiguous contract, Exhibit C, was ambiguous.

4. The plaintiff's next point is that, as a matter of law, the plaintiff is entitled to have the contract, Exhibit C, reformed. This is covered by what already has been said in dealing with the plaintiff's other points.

The decree, confirming the master's report, and allowing the defendant taxable costs from January 11, 1900, when the defendant brought into court all sums due the plaintiff under the master's report, should be affirmed.

So ordered.



ABRAHAM LEWIS vs. METROPOLITAN LIFE INSURANCE
COMPANY.

Suffolk. December 6, 1900. — February 27, 1901.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

A provision in a life insurance policy, that upon proof of death of the insured the company may pay the amount due under the policy to any relative by blood or connection by marriage of the insured or to any other person appearing to be equitably entitled to such payment by reason of having incurred expense on behalf of the insured or for his or her burial, does not enable a person of one of the classes described to sue on the policy, and such suit can only be maintained by the executor or administrator of the insured.

Payment of the premiums on the life insurance policy of another gives the person so paying them no interest in the policy, as the payments are presumed to have been made in behalf of the insured.

CONTRACT on a life insurance policy brought by the son of the insured alleged to have supported her and paid her funeral expenses and to have paid all the premiums on the policy. Writ dated April 11, 1899.

At the trial in the Superior Court, before *Bishop, J.*, the plaintiff offered in evidence a life insurance policy issued by the defendant on the life of one Esther Lewis, dated November 28, 1898, and proofs of the death of an Esther Lewis. The defendant admitted that the proofs of death were in due form, but denied that they related to the person insured.

Th policy was an endowment policy providing for the payment of \$320 when the insured should have passed the age of seventy-nine years, and containing the following provision in case the

insured should die before reaching that age: "And [the company] doth further agree, subject to the conditions aforesaid, if the insured shall die prior to the date of the maturity of the endowment, to pay, upon receipt of proofs of the death of the insured made in the manner, to the extent, and upon the blanks required herein, and upon surrender of this policy and all receipt books, the amount stipulated in the schedule below. Provided, however, that no obligation is assumed by the company prior to the date hereof, nor unless on said date the insured is alive and in sound health.

"In case of such prior death of the insured, the company may pay the amount due under this policy to any relative by blood or connection by marriage of the insured, or to any other person appearing to said company to be equitably entitled to the same by reason of having incurred expense on behalf of the insured, or for his or her burial; and the production of a receipt signed by either of said persons shall be conclusive evidence that all claims under this policy have been satisfied."

The plaintiff, Abraham Lewis, testified that he was the son of the Esther Lewis described in the proofs of death; that he had supported her for several years before her death and had paid her funeral expenses; that she died March 3, 1899, on the date stated in the proofs of death, and that he notified the company almost immediately after of her death, and was furnished blanks by them on which the proofs of death were made; that they never found any fault with these proofs; that the policy was in the possession of his mother, described as Esther Lewis; that he himself paid the premiums between the time of the issuing of the policy and the death, and that no premiums were in arrears, and that the first time that he knew that the company took the ground that a different person than the said Esther had impersonated the said Esther, and that the policy had thereby been fraudulently issued, was about four weeks after the death of the said Esther, for he always supposed that the policy was issued on his mother's life.

The judge directed a verdict for the defendant; and the plaintiff alleged exceptions.

E. H. Savary, for the plaintiff.

G. W. Cox, for the defendant.

LORING, J. The plaintiff had no rights under the policy sued on by him. The insured was his mother, Esther Lewis. The promise sought to be enforced in this action was a promise "to pay . . . the amount stipulated in the schedule below," without naming any one as the person to whom the payment was to be made. Under the clause authorizing the company to pay this sum to "any relative by blood or connection by marriage of the insured, or to any other person appearing to said company to be equitably entitled to the same by reason of having incurred expense on behalf of the insured, or for his or her burial," a payment to the plaintiff might perhaps have been a discharge of the contract, *Metropolitan Ins. Co. v. Schaffer*, 21 Vroom, 72, but that clause does not entitle one to whom such a payment might have been made, but who is not named as the beneficiary of the policy, or otherwise designated as the person who is to receive the sum to be paid, to enforce payment of the sum due under it. Such a suit can be maintained only by the executor or administrator of the insured with whom the contract was made. *McCarthy v. Metropolitan Ins. Co.* 162 Mass. 254. Neither does the fact, testified to by the plaintiff, that he "paid the premiums between the time of the issue of the policy and the death" give the plaintiff a right to sue for the amount to be paid; the premiums being paid under the policy are in legal contemplation paid by the insured. *Swan v. Snow*, 11 Allen, 224, 226. *Millard v. Brayton*, 177 Mass. 533.

Exceptions overruled.

EMMA REIMER vs. NEW YORK, NEW HAVEN, AND
HARTFORD RAILROAD COMPANY.

Suffolk. December 10, 1900. — February 27, 1901.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

In an action against a railroad company to recover for injuries sustained in falling from an unfinished granite staircase designed to be part of the approach to a station of the defendant to be constructed eighteen or twenty feet above the street, it appeared that the steps were laid to within three or four feet of the top; that two or three feet from the lowest step stood a large derrick of which

the boom passed over and along the steps near their outer edge extending nearly to the top; that there were piles of broken stone, a mortar bed, rubbish and other indications that work was going on there; that the plaintiff, a girl of sixteen, at about eight o'clock on a dark evening on her way with three other persons to take a train to go to a theatre, leaving the sidewalk followed a little beaten path across the street leading to the steps; that being the foremost of the party she went up the steps and fell on the other side. *Held*, that there was no evidence that the plaintiff was in the exercise of due care. Whether, had that question become material, it could have been found that there was evidence of an implied invitation from the defendant to the plaintiff to approach by the steps, as they were shown to exist with their surroundings, when she wished to take a train, *quære*.

TORT to recover for personal injuries sustained by the plaintiff in falling from an unfinished granite staircase designed to be part of the approach to a station of the defendant at Forest Hills in Boston. Writ dated December 2, 1896.

At the trial in the Superior Court, before *Hardy, J.*, the plaintiff, Emma Reimer, sixteen years old at the time of the accident and by occupation a stenographer, testified that she left Norwood to go to a theatre in Boston, took an electric as far as Forest Hills, and from there intended to take a train; that she left the cars and walked along the sidewalk on Washington Street until she came to a place nearly opposite the stairs up which she went. That she crossed over and walked along a "little beaten path through the mud" that led to the steps, and when she got to the top she stood and looked around, as anybody would in an unfamiliar place; that the night was very dark and misty, and there was a drizzling rain; that she did not see anything but two lights in the distance, which she supposed was a railway station; that she took a step forward and fell into a hole. The plaintiff then described how she had come from the place where the electric car stopped, on the right hand side of Washington Street, going in a northerly direction, until nearly opposite the steps. When she crossed over from the opposite side of Washington Street, the street was muddy, as it naturally would be, and she met this path which led to the foot of the stairs, and the path was not quite so muddy as the rest of the street. There was no obstruction in the path, and there were no written notices or lanterns there. The plaintiff testified that she saw something upon the outside of the steps, but did not examine it, and most likely thought it was a rail-

ing. It ran along the outside edge of the stairs all the way up. There were four in the party, the plaintiff being in advance of the others.

On cross-examination she said: "I think we must have left Norwood somewhere round seven o'clock. When we reached Forest Hills it was round eight o'clock. We expected the theatre would begin in the neighborhood of eight o'clock or quarter before. I do not remember when we formed our intention of taking the steam cars there. I think we had decided to take the steam cars from Forest Hills. I had never been at Forest Hills station before; had never taken a train there. As a girl I lived in South Boston all my life, on Eighth Street, and went to school there; lived there all the year round. Was born there and lived there all my sixteen years. I went about as any child would, in South Boston, and saw what there was to be seen. When I got to Forest Hills I did n't have any ticket to take the train, and none of my party did, as I know of."

The substance of the evidence in regard to the condition and surroundings of the unfinished stairway is stated in the opinion of the court.

At the close of the evidence, the defendant asked the judge to rule that upon the evidence the plaintiff could not recover, and the judge so ruled.

By direction of the judge the jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

J. J. Feely, for the plaintiff.

C. F. Choate, Jr., for the defendant.

KNOWLTON, J. The plaintiff was injured near the defendant's station at Forest Hills. The defendant was then engaged, under the authority of the statute, in elevating its railroad tracks from Boston to a point beyond Forest Hills. The railroad had been elevated at this point eighteen or twenty feet. The old station had been on the east side of the tracks, on a level with Washington Street, and had never been approached by going up a flight of steps. A new station had been finished on the west side of the railroad, approached by two flights of steps to which there was access from adjacent streets. Work was going on in the construction of a wall on the east side of the railroad, preparatory to the construction of a station on that

side. A flight of stone steps was in process of construction, designed to lead to the top of the wall at a considerable distance from the site of the station, and the steps were laid to within three or four feet of the top. The accident happened at a little before eight o'clock in the evening. Two or three feet out from the lower step a large derrick was set, operated by a steam engine near by, and the boom, eight or ten inches square, was left resting over the steps near the outer edge of them, extending nearly to the top. There was an electric arc light directly across the street from the foot of the steps, which lighted the steps considerably. Many men were employed there daily, and in close proximity to the steps were piles of broken stone, a mortar bed, rubbish, and other evidences that work was going on there. On the opposite side of Washington Street there was a paved walk, and there was no cross walk or flagging or constructed path across the street near the steps. All this was uncontradicted.

The plaintiff was sixteen years of age, and by occupation a stenographer. She had lived in South Boston all her life, and had been accustomed to go about and see those things which are visible to ordinary observers. She and her sister and her sister's husband and another young man came by an electric car from Norwood to Forest Hills, on their way to Boston, where they intended to visit a theatre. The evidence tends to show that they thought they were late, and were hastening to take a train on the defendant's railroad. She testified that the street opposite to the steps was all muddy, and that there was a little beaten path there, made by walking—a "little beaten path through the mud." It was agreed that after crossing the street the distance to the steps was twenty-five feet. She testified further that she looked and saw the stairs in front of her, but saw nothing else. There was no constructed path there that looked like station grounds; there was no station platform constructed, nor any lamps such as you ordinarily see on a station platform. She described something that ran up the steps, about six or eight inches in diameter. "It extended along the side of the stairs, way up from the bottom to the top. It was setting up a little from the steps, perhaps three or four feet." She did not know what it was, but said she thought it was a hand rail.

The unfinished wall had been constructed to about the same height as the steps. The plaintiff, who was the foremost of the party, went up to the top of the steps, and fell a considerable distance on the other side of the wall.

She was not a passenger on the railroad, for she had not entered into a contract with the defendant, nor reached a place intended to be used by passengers, either in waiting for trains or in approaching the station. It is difficult to see how there was any evidence of negligence on the part of the defendant. The defendant owed her no duty, unless there was an implied invitation to her to approach by that way when she wished to take a train. The unfinished steps were the only feature of the situation which looked to the possibility of an approach in that place, and when they were taken in connection with their surroundings, it is hard to discover any evidence of an invitation on the part of the defendant to pass over them. But without deciding the question whether there was any evidence of negligence on the part of the defendant, we are of opinion that the plaintiff introduced no evidence of due care on her own part. She never had been in Forest Hills before, and although there were stores on the easterly side of Washington Street and people on the sidewalk, she made no inquiries as to how to get to the station, and did not look about to see if there was any other way to go there. She did not see any building there that looked like a station. She did not see any sign reading "Forest Hills Station." She did not see any persons going before her in that direction, nor any persons coming from that direction. She saw that there was no crosswalk leading across the street, only a beaten path through the mud, and that there was no constructed walk from the street to the steps, such as is usually found on station grounds. According to the testimony of everybody, she must have passed within two or three feet of the large derrick which stood by the foot of the steps, and she passed up alongside of the boom of the derrick, but she made no examination to see what it was. Although the night was dark, she testified that there was an arc light across the street opposite to the steps, and there was testimony of many witnesses that it lighted up the place about the steps. There was no evidence that either of the plaintiff's companions had any knowledge, or gave

her any information, which should have made her believe that this was a way prepared for the use of passengers. Lawrence Tisdale, the only one of them who had ever been there before, had known for two or three months that they were making changes there and raising the track. He saw the derrick, and when they were going up the steps he did not suppose they were going to the old station. He did not see any station or any building.

We are of opinion that there was no evidence which would warrant the jury in finding that the plaintiff was in the exercise of due care at the time of the accident.

Exceptions overruled.

ALFRED DE FORGE vs. NEW YORK, NEW HAVEN, AND
HARTFORD RAILROAD COMPANY.

Hampden. October 3, 1900. — February 28, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER,
HAMMOND, & LORING, JJ.

Under the employers' liability act, the notice to the employer required by St. 1887, c. 270, § 3, may be given to a freight agent of a defendant railroad company, who has received such notices for five years, and who on receiving the notice sent it to the defendant's attorney in pursuance of general printed instructions, and in such case it is not necessary to determine whether a notice to a freight agent or an attorney of the defendant would be good, because the facts would justify a finding that the defendant in this case had recognized and acquiesced in the practice followed.

X-ray pictures may be admitted in evidence if properly taken.

In an action to recover for personal injuries consisting of a fracture of the bones of the plaintiff's left foot, the plaintiff put in evidence X-ray pictures of the plaintiff's feet printed from a glass plate, on which the feet were designated in pencil as "left" and "right" respectively, on the assumption that the true left and right were reversed in the printed pictures. A witness for the plaintiff testified that there was an enlargement of the bone of the foot marked "left" in the pictures which was the result of fracture, and on cross-examination said that, leaving the picture out, there was nothing to disclose to the eye any fracture. The defendant then offered in evidence the glass plate from which the pictures introduced by the plaintiff had been printed and pictures printed from it by an X-ray expert, and offered to show that the X-ray process placed the right foot on the right side of the plate and the left foot on the left side of the plate, and that in printing from it the objects would be reversed and the true right and left would appear; and that the foot marked "left" in the plaintiff's pictures, which his

witness had testified showed an enlargement of the bone, was really the right foot which was not injured. This evidence as well as the glass plate and pictures offered by the defendant were excluded. *Held*, that the plate and pictures and the explanatory evidence should have been admitted. *Held, also*, that the fact, which appeared, that the glass plate had on it the letters R and L which had been placed there since the pictures put in evidence by the plaintiff had been printed, was no reason for excluding the plate, as these letters did not in any way obscure the portion of the left foot in controversy, and were no more objectionable than the words added in pencil to the plaintiff's pictures. *Held, also*, that the exclusion of the plate and pictures was not within the discretion of the presiding judge, there being no question of verification.

In matters generally within the discretion of a presiding judge, his discretion is not unlimited, and he is not at liberty to disregard the rules of law by which the rights of the parties are governed. Thus the improper exclusion of an X-ray photograph will sustain an exception.

TORT, under St. 1887, c. 270, for injuries sustained by a freight brakeman while in the employ of the defendant, through the negligence of the engineer of a locomotive engine of the defendant, on which the plaintiff was riding. Writ dated October 13, 1899.

At the trial in the Superior Court, before *Dewey, J.*, the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

The case was submitted on briefs to all the justices.

W. S. Robinson, for the defendant.

J. B. Carroll & W. H. McClintock, for the plaintiff.

LATHROP, J. The first question in this case is whether the notice required by the St. of 1887, c. 270, § 3, was given to the defendant. The statute requires that it is to be "given to the employer." The person to whom the notice was given was the freight agent of the defendant in Springfield. He testified that he sent it to William E. Barnett, the attorney for the defendant in New Haven; that he so sent it in pursuance of general printed instructions, directing him to send such notices as pertained to Barnett's department; and that he had received such notices for five years. We do not think it necessary to determine whether it would have been enough to show merely a notice given to a freight agent or to an attorney of the defendant, but when it appeared that the practice of giving notices in this way had been going on for so long a time, without, so far as appears, any objection being made, it might well be found that the defendant had recognized and acquiesced in the practice.

See *McCabe v. Cambridge*, 134 Mass. 484; *Shea v. New York, New Haven, & Hartford Railroad*, 173 Mass. 177. This exception is therefore overruled.

The remaining question relates to the exclusion of evidence offered by the defendant. As a result of the accident the plaintiff's left foot was injured, and the principal inquiry at the trial was as to the extent of the injury. The plaintiff put in evidence X-ray pictures of the plaintiff's two feet, printed from a glass plate. Each of the pictures was marked under the toes of each foot, "left" and "right" respectively, both words being in lead pencil. One of the plaintiff's witnesses explained that the representation of the foot with the word "left" below it was the left foot and represented the injured foot, and the other, marked "right," was the right foot. He then testified that there had been a dislocation of the bones upward, and that an enlargement of the bone of the foot marked "left" in the picture was, in his opinion, the result of fracture, and that the man would always have a weak foot, and would not be able to perform the duties of a freight brakeman. On cross-examination he testified, that leaving out the question of fracture, there was no reason why the plaintiff could not have a perfectly useful foot; and that leaving the pictures out, there was nothing to the eye to disclose any fracture; although he had suspicions as to a fracture.

The defendant contended and offered to show that the X-ray placed the right foot upon the right side of the plate, and the left foot upon the left side of the plate, and that in printing sensitized paper the objects would be reversed; and that, as matter of fact, the pictures showing an enlargement were pictures of the right foot instead of the left. This evidence was excluded. Immediately before this the defendant had offered the glass plate from which the plaintiff's pictures were taken, and this was excluded. Subsequently other pictures printed from the same plate were offered in evidence and were excluded.

No reason appears in the exceptions why the evidence offered by the defendant was excluded; and we can see no reason why the plate from which the pictures put in evidence by the plaintiff were printed should not have been admitted. It was produced by the photographer who made the pictures. The ground

urged by the plaintiff against its admission was that it had on it the letters R and L, which had been put on since the pictures put in evidence by the plaintiff had been printed. These letters did not in any way obscure the portion of the left foot in controversy; and were certainly no more objectionable than the letters added in pencil to the plaintiff's pictures.

It is further contended by the plaintiff that there was some doubt as to the manner in which the plate was made, and that the judge might have excluded it for that reason. We see nothing in the exceptions to substantiate this claim. If it were true, then the plaintiff's pictures should not have been admitted.

It is entirely clear from the testimony that the picture on the glass plate was not taken by a lens but by an X-ray machine; and that it was the impression of a shadow, not a reflection of an object, the plate being below the feet, and the light above them. When pictures were printed from the plate the position of the feet would be reversed; and this would have been demonstrated had the plate and the pictures taken by the defendant been admitted. The plaintiff assumed from his marking on the pictures admitted that the feet as represented on the plate were reversed, which is not in accordance with the testimony given by his own witnesses as to the manner in which the impressions on the plate were produced.

Lastly it is asserted that the judge might have excluded in his discretion the plate and the pictures offered by the defendant. The rule is thus stated by Chief Justice Gray in *Blair v. Pelham*, 118 Mass. 420: "A plan or picture, whether made by the hand of man or by photography, is admissible in evidence, if verified by proof that it is a true representation of the subject, to assist the jury in understanding the case. . . . Whether it is sufficiently verified is a preliminary question of fact, to be decided by the judge presiding at the trial, and not open to exception." It is therefore in the matter of verification or authentication that the judge has discretion. But here there was no question of this sort. The plaintiff had put in two pictures printed from the glass plate. The defendant then offered the plate together with two other pictures made from the same plate; and the evidence of verification was stronger in the case of the defendant's,

pictures than in the case of the plaintiff's. The photographer who took the plaintiff's pictures testified that he did not know much about the X-ray; while the person who took the pictures for the defendant was a physician of high standing who had taken, as he testified, in the neighborhood of a hundred X-ray pictures, and had seen the majority of them developed. On this evidence we do not deem it possible that the judge could have excluded the plate or the pictures on the ground that they were not duly verified. While a picture produced by an X-ray cannot be verified as a true representation of the subject in the same way that a picture made by a camera can be, yet it should be admitted if properly taken. *Bruce v. Beall*, 99 Tenn. 303.

The rule laid down by Chief Justice Gray in *Blair v. Pelham* is in accordance with earlier and later cases in our reports. *Hollenbeck v. Rowley*, 8 Allen, 473. *Marcy v. Barnes*, 16 Gray, 161, 163. *Randall v. Chase*, 133 Mass. 210, 213. *Turner v. Boston & Maine Railroad*, 158 Mass. 261, 265. *Commonwealth v. Morgan*, 159 Mass. 375. *Farrell v. Weitz*, 160 Mass. 288. *Van Houten v. Morse*, 162 Mass. 414, 422.

It is true that the opinion in *Gilbert v. West End Street Railway*, 160 Mass. 403, after stating many reasons why the photograph offered in evidence in that case was properly rejected, concludes in these words: "We think at least it was in the discretion of the court to reject it," citing *Farrell v. Weitz*, *ubi supra*. But the case cited was not decided on the ground that the judge had discretion except on the matter of verification; and we do not think that the court intended to lay down a broader rule than that stated in *Blair v. Pelham*.

It is also true that in some cases a somewhat broader rule is laid down. See *Verran v. Baird*, 150 Mass. 141; *Harris v. Quincy*, 171 Mass. 472; *Carey v. Hubbardston*, 172 Mass. 106. An examination of the papers in these cases leaves no doubt in our minds that the cases were properly decided, whether the reasons given were in accordance with the rule laid down in *Blair v. Pelham* or not.

In *Beals v. Brookline*, 174 Mass. 1, where photographs were admitted, it was said: "In the admission of such evidence much must be left to the discretion of the presiding justice, and we are not prepared to say that there was error in law in permitting them to be shown to the jury."

But in this as in other matters, which may be left generally to the discretion of the trial judge, his discretion is not unlimited, and the judge is not at liberty to disregard the rules of law, by which the rights of the parties are governed. See *Woodward v. Leavitt*, 107 Mass. 458, 460; *Chandler v. Jamaica Pond Aqueduct*, 122 Mass. 305.

We are of opinion that the rights of the defendant in this case were violated, and that the glass plate, the pictures taken by the defendant and the evidence offered by the defendant and excluded should have been admitted. It was clearly competent for the defendant to introduce evidence to show that the plaintiff's pictures showing an enlargement of one of the feet, and from which a witness for the plaintiff discovered a fracture, did not represent the left foot but the right, and for this purpose to show the difference between an ordinary photograph and one taken by an X-ray.

As the only exception relating to the question of liability has been overruled, the new trial will be on the question of damages only.

So ordered.

LEVI HUDSON, administrator, *vs.* LYNN AND BOSTON
RAILROAD COMPANY.

Essex. November 8, 1900. — February 28, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER,
HAMMOND, & LORING, JJ.

The conductor of an electric car lawfully may eject a passenger whose conduct is such as to justify an inference of his intoxication and cause a just apprehension of acts of impropriety, rudeness or disturbance on his part. The conductor need not wait until some act of this kind has been committed.

Pub. Sts. c. 112, § 197, providing that a traveller who does not pay his fare "shall not be entitled to be transported for any distance, and may be ejected from a street railway car" applies to electric cars although it was enacted before their introduction.

The conductor and motorman of an electric car, having sufficient cause lawfully to eject a certain passenger, lifted him and carried him out of the car apparently in a state of intoxication and left him on a dark and rainy night on a lonely and unlighted road occupied in part by the track of the street railway, over which cars were passing in both directions at intervals of fifteen minutes, at a

place where there were no buildings or shelter and three minutes distant from a place where there were buildings and shelter. *Held*, that although the person so ejected ceased to be a passenger when ejected, he had a right of action for assault, which survived to his administrator, against the railway company for the acts of its servants in exercising their right of ejection in an improper manner and without due care. Whether, if the person thus ejected was run over and killed by a car of the railway company in consequence of his exposure to danger by reason of such ejection, his administrator could maintain an action for loss of life under St. 1886, c. 140, *quere*.

TORT to recover damages for the loss of life of the plaintiff's intestate by reason of being struck and run over by one of the defendant's cars; and also for an assault alleged to have been committed upon the plaintiff's intestate in being ejected from a car of the defendant by its agents and servants. Writ dated September 28, 1898.

At the trial in the Superior Court, before *Stevens, J.*, the plaintiff presented evidence of which the substance is stated in the opinion of the court.

At the close of the plaintiff's evidence, on motion of the defendant, the judge ruled that the action could not be maintained, and ordered the jury to return a verdict for the defendant.

The jury returned a verdict as directed; and the plaintiff alleged exceptions.

The case was argued at the bar in November, 1900, and afterwards was submitted on briefs to all the justices.

F. D. Allen, for the plaintiff.

H. F. Hurlburt, (*D. E. Hall* with him,) for the defendant.

BARKER, J. The evidence tended to show that on the night of September 7, 1898, Pope, the plaintiff's intestate, took one of the defendant's out bound electric cars in the Boston Subway, paid a single fare, saying as he paid "When I pay my next fare I shall want a transfer to Upper Swampscott line," and was carried as a passenger toward Lynn. His second fare became payable as the car was passing over the Lynn marshes. Shortly after paying the first fare he began to act in a manner which would justify the conclusion that he was intoxicated, and before the car reached the point where the second fare was to be paid he was in a sleep or stupor, which the conductor had made several ineffectual attempts to break. When the conductor came in to collect the second fares Pope was sitting up asleep.

The conductor first took the fares of the other passengers, then came to Pope and shook him several times and tried to wake him up, but he made no response. After this shaking had continued for some time and Pope did not awaken, the conductor stopped the car and the motorman came in and asked what the matter was. The conductor replied, "No matter what he is doing, we will put him off here in the mud; the next time he will know about paying his fare." They then lifted him, carried him out of the car, left him in the road, and the car went on its way.

The night was dark and rainy. The road in which he was left was not lighted and was occupied in part by the defendant's track over which its cars were passing in each direction at intervals of fifteen minutes. Teams were accustomed to use the road at night. There were no sidewalks, the road was through the Lynn marshes, and there were no dwellings, or other buildings, or any shelter in the vicinity. Farther along towards Lynn, three minutes' run of the car distant, were dwellings and shelter.

About half an hour after Pope had been so taken from the car he was on the ground upon the railroad track, and was run over and killed by one of the defendant's cars going toward Boston and run by the same conductor and motorman who had ejected Pope. There was testimony from the motorman of the car which followed that from which Pope was ejected that when this next car passed the locality where Pope had been left the motorman saw a man standing alone against the fence between it and the track, about fifteen minutes after Pope had been ejected. There was no other testimony on the subject of how Pope came to be on the ground on the track when struck by the car.

The action is brought by his administrator, and the declaration has counts under St. 1886, c. 140, to recover for loss of life, and also a count at common law for an assault alleged to have been committed in ejecting him from the car. Upon the evidence introduced by the plaintiff a general verdict for the defendant was ordered, which must be set aside if any of the counts should have been submitted to the jury.

We are of opinion that Pope ceased to be a passenger when

ejected from the car. Two things had occurred to give the defendant a right to terminate his relation as a passenger. The first was his conduct, which whether in fact due to intoxication, to the effect of a drug or to illness from some other cause, was such as to justify an inference that it was due to intoxication, and to found a just apprehension that unless he should be ejected, it might result in acts of impropriety, rudeness or disturbance on his part. The conductor was not bound to wait until some act of this kind had been committed, but could expel the passenger in order to prevent such misconduct as was to be apprehended from a person in his apparent condition. *Vinton v. Middlesex Railroad*, 11 Allen, 804. *Murphy v. Union Railway*, 118 Mass. 228.

The other circumstance which gave the defendant a right to eject him was the fact that he had not upon demand paid the fare for that part of his journey then being made. The law regulating the rights of passengers upon street railways in this respect is contained in the following clause of Pub. Sts. c. 112, § 197. "Whoever does not upon demand first pay such toll or fare shall not be entitled to be transported for any distance, and may be ejected from a street railway car." No doubt this was enacted before the introduction of electric cars, and when most street cars ran on streets where it would be safe to leave a passenger at any time. But the provision remains unchanged, and governs wherever the railway may be located. Therefore by the terms of the statute, Pope having not paid his fare upon demand, he was not thereafter entitled to be transported for any distance, and might be ejected from the car. This having been done, even if in an improper manner, his status as a passenger was terminated, although he may have had a right of action for his damages, if the ejection was effected in a wrong manner.

We are of opinion that it was so effected, and that it was therefore an assault upon his person, and that it gave him, if damaged thereby, a right of action which would survive to the plaintiff, under the provisions of Pub. Sts. c. 165, § 1. When taken from the car Pope was in a stupor or sleep, unable to take cognizance of surrounding objects, having no power to stand upright or to walk, and with no control of his own body. To place and leave him in such a condition, in a dark road on a wet

night, at a spot distant from human habitations, near the path of cars and other vehicles, near marshes which adjoined the road on both sides, and with no one to care for or protect him, was an act fraught with imminent danger to him. It fell far short of the duty of the defendant to him as a human being, in that it unnecessarily and wantonly exposed him to great peril to which he would not have been exposed if the right of the defendant had been exercised by its servants in a reasonably humane manner. It was not the due and proper care required of the defendant in the exercise of its right to eject a passenger whose conduct was improper, or who had not paid his fare upon demand. See *Lovett v. Salem & South Danvers Railroad*, 9 Allen, 557; *Murphy v. Union Railway*, 118 Mass. 228.

In the opinion of a majority of the court this requires us to sustain the exceptions, and to send the case back for a new trial. As the evidence may then be different, we do not feel called upon to express an opinion upon the question whether the statutory action can be supported upon the evidence stated in the present bill of exceptions.

Exceptions sustained.

S. B. WILLOCK vs. EDWIN E. WILSON & another.

Suffolk. November 13, 1900. — February 28, 1901.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

In an action on a judgment rendered in another State, the plaintiff offered in evidence a document purporting to be a copy of the record of the court that rendered the judgment, the attestation of which was signed "A. B. Clerk District Court, by C. D., Deputy Clerk." It was also signed by the judge of the court, who certified that A. B. was the clerk of the court and keeper of the records and seal thereof at the time of attestation, and that the certificate was in A. B.'s handwriting and that the attestation was in due form and made by the proper officers. *Held*, that the attestation did not comply with the requirements of U. S. Rev. Sts., § 905, because the certificate was not signed by the clerk; and that this defect was not cured by the certificate of the judge that the attestation was made by the proper officers, as all he could certify to under the statute was that the attestation was in due form. *Held, also*, that the attestation was not good under Pub. Sts. c. 169, § 67, as it did not appear that the deputy clerk who signed the certificate was the officer having charge of the records of such court.

CONTRACT on a judgment obtained in the District Court of Shawnee County, Kansas, Third Judicial District, by the plaintiff, a resident of the State of Missouri, against Edwin E. Wilson, of this Commonwealth, and William B. Johnson, of the State of Vermont, copartners, having a usual place of business in Boston in this Commonwealth. Writ dated August 14, 1899.

At the trial in the Superior Court, before *Hardy*, J., the plaintiff offered in evidence a certificate of the proceedings in the Kansas court, but no transcript or copies of any of the papers in the case. It was not contended that any service was made upon the defendants in the original action, but there was an appearance of attorneys for the defendants, as set forth in the certificate; and there was evidence tending to show that the defendant Wilson authorized his attorney to appear for the partnership and look after his interests in the action, and the judge found that such was the fact. The defendant was not himself present in court at the trial of this action, but there was evidence tending to show that he was in Boston about his business at the time of trial. The certificate of proceedings purported to be attested by the clerk of the above named Kansas court, but was signed "A. M. Callaghan, Clerk District Court, by J. F. Curtis, Dep. Clerk." There was also a certificate of the judge of the court that A. M. Callaghan was the clerk of that court, but no certificate or other verification as to J. F. Curtis, who signed the certificate, and no signature or certificate by A. M. Callaghan. There was a third certificate purporting to be by "A. M. Callaghan, Clerk of the District Court of the Third Judicial District of Shawnee County in the State of Kansas," that the judge signing the preceding certificate was the judge of that court. This certificate was also signed "A. M. Callaghan, Clerk District Court, by J. F. Curtis, Deputy Clerk." These certificates were under the seal of the Kansas court. The certificate of the judge was as follows:

"State of Kansas, Shawnee County, ss. I, Z. T. Hazen, Judge of the District Court in and for the county and State aforesaid, and of the Third Judicial District, do hereby certify that A. M. Callaghan, whose name is subscribed to the foregoing certificate of attestation, now is, and was at the time of sealing the same, the clerk of said court whereof I am the judge,

and the keeper of the records and seal thereof, duly elected, commissioned and qualified as such clerk. The signature to the above certificate is in his handwriting, and said attestation is in due form of law and made by the proper officers. In witness whereof, I have hereunto set my hand, at Topeka in said State and county, this second day of March, 1899. Z. T. Hazen, Judge of the District Court." The seal of the court was attached.

No other evidence was offered at the trial in proof of the judgment. No service was made upon the defendant Johnson, in this action, and the plaintiff discontinued as to him and was allowed to proceed against the defendant Wilson alone. It did not appear that the defendant Johnson had authorized any appearance for himself in the Kansas suit, but the alleged record recited that the defendants appeared by their attorneys. The alleged decree of the Kansas court was against "E. E. Wilson and W. B. Johnson, partners."

The defendant objected to the admission of the certificate of proceedings in evidence, but the judge admitted it and the defendant excepted. The defendant requested the judge to rule that upon all the evidence the plaintiff was not entitled to recover.

The judge refused so to rule and found for the plaintiff; and the defendant, Wilson, alleged exceptions.

J. E. Kelley, for Wilson.

E. C. Bates, for the plaintiff.

HAMMOND, J. This is an action on a judgment rendered by a court in the State of Kansas against the defendant Wilson of this Commonwealth and one Johnson of the State of Vermont, copartners, having their usual place of business in Boston in this Commonwealth. The action in the Kansas court was begun by an attachment of certain partnership property. In the present action the plaintiff discontinued as against Johnson, and was allowed to proceed against Wilson alone. To this Wilson excepted.

At the trial the plaintiff offered in evidence a certificate of the proceedings in the Kansas court, but no transcript or copies of any of the papers in the case. It was not contended that any service was made in the original action upon the defendants, but

there was an appearance of attorneys for them; and there was evidence tending to show, and the court found, that the defendant Wilson authorized the attorneys to appear for the partnership and also to look after his individual interest in that action. The defendant was not personally present in court at the trial of this action, but there was evidence tending to show that he was then in Boston about his business. A certificate of the proceedings in the Kansas court was admitted against the objection of the defendant, and he excepted.

The first objection made by the defendant is that the judgment record of the proceedings of the court of a sister State should bear upon its face some evidence that the court from which it purports to come is one of general and not of inferior jurisdiction. As a short answer to this objection it might be said that the certificate of the proceedings is not made a part of the bill of exceptions, and we do not know what it bears upon its face. We cannot therefore say that the court was in error in finding that the Kansas court was one of general jurisdiction. *Knapp v. Abell*, 10 Allen, 485.

The next objection is that the certificate of the proceedings is an incomplete and imperfect record, inasmuch as it does not show the existence of a writ, or the subject matter of the suit, or that there was any jurisdiction over it, or the defendants, or that there was any service of process or any issue joined. Here again it might be said that the certificate is not before us, and we cannot tell what it contains.

There is, however, among the pleadings in this suit, what the declaration alleges to be a certified copy of the record of the court in the suit in which the judgment was obtained, and we suppose that to be the certificate to the admission of which as evidence the defendant at the trial excepted. Assuming this to be so, we proceed to discuss the merits of these objections.

Upon an examination of the certificate it is seen that it purports to be a record of proceedings "in the District Court in and for the County of Shawnee and State of Kansas." The title of the case is "S. B. Willock, Plaintiff, vs. E. E. Wilson and W. B. Johnson, partners as Wilson & Johnson, Defendants." It recites that on October 11, 1898, the parties appeared for trial, "the plaintiff appearing in person and by his attorney

J. J. Schenck, and the defendants appearing by their attorneys A. Bergen and A. W. Dana"; that a jury was impanelled "to try this cause"; that they were sworn and took their seats in the jury box; that evidence was put in, and that the jury, after hearing all the evidence offered by the parties and the instructions of the court as to the law in the case, retired under the charge of a "sworn bailiff" to consider as to their verdict; and that after due consideration they returned their verdict into open court in favor of the plaintiff against both defendants, and assessed damages in the sum of \$381.84, whereupon judgment was ordered by the court upon the verdict, together with costs taxed at a certain sum. Here, then, is a trial before a jury, where evidence is presented, and the jury are instructed, all as in a court of common law of general jurisdiction. The defendants appear and fully try the case and submit it to a jury without any exception, so far as appears, to the jurisdiction of the court over the subject matter of the suit, or over them as parties defendant. In the absence of any evidence to the contrary, the fair inference is that the appearance was a general appearance.

In this action against these defendants upon that judgment, this record was amply sufficient to justify a finding that the court was one of general jurisdiction; that it had jurisdiction over the subject matter of the suit, and also over the defendants, either because proper service had been made upon them or because they voluntarily entered a general appearance for the purpose of trying the case upon its merits; that an issue was joined and tried before a jury, who found for the plaintiff; and that the judgment was rendered on the verdict. *Brainard v. Fowler*, 119 Mass. 262. Moreover, as respects the existence of a writ and the beginning of the action, it is stated in the bill of exceptions that the action in the Kansas court was begun by an attachment of personal property, which was afterwards applied by the court in part payment of the judgment. The case is clearly distinguishable from *Phelps v. Brewer*, 9 Cush. 390, upon which the defendant relies. In that case, which was an action upon a judgment obtained in a court in Connecticut against a firm, it was decided that the defendant Brewer, a resident in this Commonwealth during the time of the original action, was not bound by the judgment. The ground of the

decision was that no service was ever made upon him, and no person ever had authority to appear in that action for him, either as a partner or as an individual.

The defendant further objected to the admission of the certificate upon the ground that it was not properly authenticated, because it does not appear that the judge who signed it was the sole or presiding justice of the court, and because the attestation of the records is made by the deputy clerk. The federal statute upon this subject requires that the records shall be proved "by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with the certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form." U. S. Rev. Sts. § 905. The officers are the judge and the clerk. The judge in his certificate in this case says that Callaghan is the "clerk of said court whereof I am the judge." He uses the definite article "*the* judge," in the very language of the statute, and the fair inference is that he is the sole judge of the court and the proper person to sign the attestation.

But the certificate as to the records is not signed by the clerk but by a deputy clerk. The statute requires that the attestation shall be made by the clerk. An attestation by a deputy clerk is not within its terms. 1 Greenl. Ev. § 506. *Morris v. Patchin*, 24 N. Y. 394. *Sampson v. Overton*, 4 Bibb, 409. *Lothrop v. Blake*, 3 Penn. St. 483. *Ensign v. Kindred*, 163 Penn. St. 638. And that would be so, even if the State in which the court existed had given to the deputy clerk the same power to certify as to the clerk. To hold otherwise, would leave it in the power of the State to change the federal statute in respect to the persons who should certify the records under it, or, in other words, to modify or control an act of Congress where by the Constitution of the United States that act was supreme. *Lothrop v. Blake*, 3 Penn. St. 483.

Nor is this defect cured by the certificate of the judge that the attestation is in the handwriting of the clerk, and that the attestation is made by the proper officers. The only thing to which under the statute the judge can certify is that the "attestation is in due form." This is a certificate simply that in the attestation the forms in use in the State from which the record comes have been observed, and this is necessary because

the courts of one State do not officially know the forms in use in another State. The certificate of the judge as prescribed by the statute is that the attestation of the clerk is in due form, but he is not authorized to certify that the certificate of the deputy clerk is of equal validity with that of the clerk in the State where made. *Morris v. Patchin, ubi supra*. It follows that the record was not attested by the proper officer, and that it was not admissible under the federal statute.

But that statute was passed for the purpose of prescribing the kind of proof of the existence of a record of a court in one State upon which a sister State might insist before it could be called upon to give to the record the full faith and credit imposed by the federal Constitution; and it is well settled that the method of authentication therein prescribed is not exclusive. Neither the federal Constitution nor the statute forbids the States from authorizing the proof of records in other modes in their own State courts, providing always of course that the State statute if put into force shall not have the effect of excluding a record authenticated according to the requirements of the federal statute. 1 Greenl. Ev. § 505. *Kingman v. Cowles*, 103 Mass. 283.

It remains to be seen whether the record was admissible under our own statute, which, so far as material, is as follows: "The records and judicial proceedings of any court of another State . . . shall be admissible in evidence . . . when authenticated by the attestation of the clerk, prothonotary, or other officer having charge of the records of such court, with the seal of such court annexed." Pub. Sts. c. 169, § 67. It is not necessary under this statute that there should be any certificate by the judge of the court, although in *Capen v. Emery*, 5 Met. 436, his certificate under seal of the court that the court in which the judgment was rendered was abolished and the records transferred to his court was taken as evidence of those facts. The clerk is the proper custodian of the records of a court, and the seal of the court attached to his certificate attests the possession of the records in the person who certifies, and a record so certified is admitted under our statutes without further proof.

But where the certifying officer is other than the clerk, it should appear by the certificate or otherwise that he has "charge

of the records." *Kingman v. Cowles, ubi supra*. The person attesting the records in this case is the deputy clerk acting in the name of the clerk. It should therefore be made to appear somewhere that the deputy clerk is in charge of the records. Upon looking into the attestation it appears that they are under the custody of the clerk, and the judge certifies under the seal of the court that the clerk is "the keeper of the records and seal," and it is nowhere stated that the records are at any time in the custody of the deputy clerk. The attestation, therefore, does not appear to have been made by the person having the charge of the records within the meaning of Pub. Sts. c. 169, § 67.

It is true that the judge certifies that the signature is in the handwriting of Callaghan the clerk, and that the attestation is in due form and made by the proper officers. We hardly see how it happened that if the clerk desired to make an attestation himself and was present with pen in hand to do it, he concluded to affix the name of the deputy clerk so as to make it appear not as his own personal act but as that of his deputy acting for him; and the most natural explanation of the judge's certificate is that he took a printed form to be used by him when the attestation was signed by the clerk and inadvertently signed it without erasing or modifying the printed clause. At any rate, even if we are to consider the certificate of the judge as evidence of the statements therein contained, it still appears that the attestation is in form and in law not the clerk's own personal act but the act of his deputy in the name of the clerk. The further statement of the judge that the attestation is in due form and made by the proper officers, especially when taken in connection with the statement that the clerk is the keeper of the records, falls far short of a statement that the person personally making the attestation, namely the deputy clerk, is the one having charge of the records.

The result is, that the attestation did not meet the requirements of the federal or State statute and the record was not admissible.

In permitting the case to go on against Wilson alone, no service having been made on Johnson, a non-resident, no error in law appears. Pub. Sts. c. 164, § 14.

Exceptions sustained.

JAMES H. STARK & another vs. MARY A. MANSFIELD
& others.

Suffolk. December 3, 1900. — February 28, 1901.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

A lease of land for one hundred years without words of inheritance, reserving rent payable semiannually, with a perpetual right of renewal in the tenant at the end of each hundred years on condition that the rent payable on such renewals shall be equal to a certain percentage of the value of the land and never less than that named in the lease, reserves to the lessor an estate in fee; and if the land is taken for a railway station, under an act providing for the assessment of damages in accordance with the laws of the Commonwealth relating to the taking of land for railroad purposes, the lessor on application to the Probate Court under Pub. Sts. c. 49, § 19, is entitled to have a trustee appointed to receive the sum awarded and hold and administer it under the provisions of § 18 of the same chapter. The existence of a sublease of a part of the term and of a mortgage by the tenant of his interest does not make it necessary for the lessor to apply for an apportionment of damages under § 22 of the same chapter.

Pub. Sts. c. 121, § 1, providing that "When land is demised for the term of one hundred years or more, the term shall, so long as fifty years thereof remain unexpired, be regarded as an estate in fee simple as to everything concerning the descent and devise thereof" and for certain other purposes, and further providing that "whoever holds as lessee or assignee under such a lease shall, so long as fifty years of the term are unexpired, be regarded as a freeholder for all purposes," does not give the lessee a fee nor deprive the lessor of his reversion.

A deed from a tenant holding a lease for one hundred years with a right of perpetual renewal containing words of grant and inheritance with a covenant that the grantor is "lawfully seised in leasehold of the granted premises and that they are free from all encumbrances except a ground rent of three hundred dollars per annum," does not disseise the lessor, but should be construed as a conveyance of the interest under the demise rather than as one wrongful and paramount to it.

PETITION to the Probate Court, under Pub. Sts. c. 49, § 19, for the appointment of a trustee to receive, hold and administer under § 18 of the same chapter the sum paid by the Boston Terminal Company for the taking of a house and land on Cove Place in Boston under St. 1896, c. 516, filed March 28, 1900.

The case came before this court on appeal from a decree of the Probate Court dismissing the petition, and was reserved on the pleadings and agreed facts by *Hammond, J.*, for the consideration of the full court.

On April 1, 1885, the petitioners were the owners in fee of

the land and building No. 20 Cove Place in Boston, and on that day executed and delivered to Asa B. Wheeler the following indenture called a lease, duly executed, acknowledged and recorded :

“ This Indenture made this first day of April in the year eighteen hundred and eighty five, between Frederick J. Stark and James H. Stark Trustees of the Starks Credit Foncier, pursuant to their Articles of Association which are recorded with Suffolk Deeds in Libro 1056 et Folio 12 et Libro 1206 et Folio 11 of the first part, and Asa B. Wheeler of the City of Brockton, County of Plymouth and State of Massachusetts of the second part Witnesseth, that the said party of the first part doth hereby demise and lease unto the said party of the second part the following described real estate in the City of Boston, County of Suffolk and State of Massachusetts, to wit: A dwelling house and lot of land which is bounded and described as follows, to wit: [Description.] The building on said land being now numbered 20 Cove Place. To have and to hold the same for the term of one hundred years, beginning with the first day of April in the year eighteen hundred and eighty five, yielding and paying therefor rent at the rate of three hundred dollars per annum, to be paid in equal semi-annual payments, the first of such payments to be made on the first day of October next ensuing at the office of the lessors, or of their heirs and assigns in the City of Boston in gold or silver coin of standard fineness, as determined by the present lawful assay thereof, and full weight, and thenceforth on the termination of each succeeding half year until the termination of this lease. And the Lessors hereby covenant with the said Lessee and his heirs and assigns that the said premises are free from all incumbrances done or suffered by them, and that they will warrant and defend the Lessee in the peaceable use and occupation thereof, under the terms of this lease, against all persons claiming by, through or under them but against none others. And the Lessee for himself and his heirs and assigns hereby covenant that he and his heirs, executors, administrators and assigns will pay the said rent in manner aforesaid, and also all taxes, water rates and assessments whatsoever, whether assessed to the Lessors or to the Lessee, to which said premises may become liable during

the said term, that they will not make or suffer any strip or waste, or any unlawful use of the said premises, and that they will allow the Lessors and their heirs and assigns, and their agents at seasonable times to enter upon said premises, and examine the condition thereof, and will keep all and singular the said premises in good tenantable repair, and shall keep the buildings thereon insured against fire in the sum of one thousand dollars, and payable to the Lessors or their heirs and assigns in case of loss, who shall retain such money in their possession until the buildings shall have been repaired in as good condition as they stood before the fire when the Lessors shall pay such insurance money to the Lessee. And the said Lessee for himself and for his heirs and assigns, further covenants with the Lessors and their heirs and assigns, that at the end of the said term of one hundred years herefrom they will peaceably deliver up to the Lessor or his heirs and assigns, the said premises, together with all future erections or additions upon or to the same, in such good and tenantable repair as aforesaid, and vacant and unincumbered and in good tenantable order and condition. And the Lessors for themselves and their heirs and assigns further covenant with the Lessee and his heirs and assigns that at the end of each term of one hundred years from this date, that at his or their option, they or their heirs and assigns will renew this lease for another term of one hundred years and so on forever on condition that the rent payable under such renewals shall be equal to at least six per cent per annum of the then actual cash value of the leased premises as estimated at the date of each and such renewals and provided further that such annual rents shall never be less than that named in this lease. Provided always and these presents are on the condition, that in case of a breach of any of the covenants to be observed on the part of the Lessee, or of those claiming under him, the Lessors or their heirs or assigns may while the default or neglect continues, and notwithstanding any license or waiver of any prior breach of condition, without any notice or demand, enter upon the premises, and thereby determine the estate hereby created, and may thereupon expel and remove forcibly, if necessary, the Lessee and those claiming under him, and their effects. And I, Kate Stark and Bertha H. Stark, the

wives of the said Lessors, and Mary Stark, widow of John H. Stark late of said Boston, deceased, for one dollar consideration to *me paid* by the said Lessee, do hereby release the estate of the said Lessee hereby created, from all right to dower or homestead in the leased premises therein described. In witness whereof the said parties hereunto and to another instrument of like tenor, set their hands and seals on the day and year first above written."

On April 15, 1892, Wheeler, the above named lessee, executed and delivered to the respondent Mary A. Mansfield an assignment of the foregoing indenture as follows :

"Know all Men by these Presents, That I, Asa B. Wheeler of Wakefield in the County of Middlesex and Commonwealth of Massachusetts, in consideration of one dollar and other valuable consideration paid by Mary A. Mansfield of Marlboro in said Commonwealth, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell and convey unto the said Mary A. Mansfield, a dwelling house and lot of land which is bounded and described as follows, to wit: [Description.] And being the same premises conveyed to me by James H. Stark and Frederick J. Stark by deed dated April 1st 1885 and recorded with Suffolk Deeds Libro 1673 Fol. 547, said premises being situated in the City of Boston and Commonwealth aforesaid. To have and to hold the granted premises, with all the privileges and appurtenances thereto belonging to the said Mary A. Mansfield and her heirs and assigns to their own use and behoof forever. And I hereby for myself and my heirs, executors and administrators covenant with the grantee and her heirs and assigns that I am lawfully seized in leasehold of the granted premises, that they are free from all incumbrances except a ground rent of three hundred dollars per annum, that I have good right to sell and convey the same as aforesaid, and that I will and my heirs, executors and administrators shall warrant and defend the same to the grantee and his heirs and assigns forever against the lawful claims and demands of all persons except as aforesaid. And for the consideration aforesaid I, Emma L. Wheeler wife of Asa B. Wheeler hereby release unto the grantee and her heirs and assigns all right of or to both dower and homestead in the granted premises."

On November 13, 1892, Mary A. Mansfield mortgaged the house and lot in question to the respondent, Charles J. Mansfield, her son, and on February 20, 1896, leased the same property for eighty-eight years to the respondent, Joanna F. Mansfield, wife of Charles J. All of the instruments mentioned were recorded.

Charles J. Mansfield was not in possession of the property as mortgagee, and had only such rights as were given him by his mortgage.

The rent was paid to the petitioners by Mary A. Mansfield, under the indenture of April 1, 1885, up to the time of the taking hereafter mentioned.

On January 5, 1897, the Boston Terminal Company, acting under the provisions of St. 1896, c. 516, took the property for the South Terminal Station, and by agreement of all the parties deposited \$9,000, as compensation for the property, to be disposed of according to law.

It was agreed that the parties to this proceeding stood in the same relation to this sum as though it had been awarded by a jury as entire damages. The respondents contended that the above named sum should be apportioned as provided by Pub. Sts. c. 49, §§ 20-25.

The petitioners filed the following objections to the decree of the Probate Court dismissing their petition: "1. They were, at the time of the taking mentioned in their petition, the owners of the property mentioned therein, and the remainder or reversion in fee belonged to them. 2. The respondent Mary A. Mansfield had, at the time of said taking, an estate for years in said property. 3. No other person or persons had, at the same time, any estate or interest in said property. 4. The facts alleged and proved present a case for the appointment of a trustee, as provided in chapter 49 of the Public Statutes, secs. 18, 19. 5. The parties cannot agree upon the choice of such trustee."

C. W. Cushing, for the petitioners.

J. W. Keith, (*J. P. Silsby* with him,) for the respondents.

HOLMES, C. J. This is a petition to the Probate Court under Pub. Sts. c. 49, § 19, for the appointment of a trustee to receive the sum paid by the Boston Terminal Company for the taking of certain land under St. 1896, c. 516, and to hold the said sum

for the benefit of the parties according to Pub. Sts: c. 49, § 18. The Probate Court dismissed the petition, and the petitioners appealed. The case was reported by a single justice to the full court. It is not denied that these sections of the Public Statutes are adopted by reference. St. 1896, c. 516, § 23. Pub. Sts. c. 112, §§ 95, 100, 107. But it is denied that the petitioners have a standing under them because it is denied that they have any property in the land taken. It is contended further that if the petitioners are entitled to any interest in the said sum there should be an apportionment under Pub. Sts. c. 49, § 22, instead of a trust under § 18.

The petitioners demised the premises for one hundred years to one Wheeler, without words of inheritance, reserving a certain rent. There was given also a perpetual right of renewal at the choice of the tenants, with provision for fixing the rent which never was to be less than that originally reserved. Wheeler conveyed to the respondent Mary A. Mansfield, who made a mortgage and sublease. The respondents contend that Wheeler took a base fee, leaving in the petitioners a mere possibility of reverter, or right of re-entry, citing *Jamaica Pond Aqueduct, v. Chandler*, 9 Allen, 159, 167, *Robb v. Beaver*, 8 W. & S. 107, and *Stephenson v. Haines*, 16 Ohio St. 478. But in those cases the so called leases contained words of inheritance in the habendum, and it does not need argument or authority to show that an instrument like the present cannot convey a fee at common law.

The only argument needing consideration is based on Pub. Sts. c. 121, § 1, and that may be disposed of in a few words. The earlier part of the section provides that when land is demised for a term of one hundred years or more, the term, so long as fifty years of it remain unexpired, shall be regarded as an estate in fee simple as to everything concerning its descent and various other incidents not affecting this case. The section then ends with the words, "and whoever holds as lessee or assignee under such a lease shall, so long as fifty years of the term are unexpired, be regarded as a freeholder for all purposes." But this does not give the lessee a fee, it simply gives to his interest a dignity and quality equal to a life estate. It is not intended to destroy or impair the reversion of the lessor or to make it in

any degree less an estate than it was before. The respondents' principal contention seems to us entirely unfounded.

The deed of Wheeler to Mansfield did contain words of inheritance, and it might possibly be argued, although it was not, that this was a disseisin of the petitioners, and that if the petitioners were disseised they had no standing to make a claim against this fund. We mention the suggestion simply to show that it was not overlooked. Taking the deed as a whole, and seeing that it conveyed the premises subject to the rent reserved, and covenanted that the grantor was "seised in leasehold," we are of opinion that it should be construed as a conveyance of the interest created by the demise rather than as one wrongful and paramount to it, the language suggestive of a fee being used pretty evidently merely to express the effects of the statute just cited, as to long terms. See *Hollenbeck v. McDonald*, 112 Mass. 247, 249, 250.

When the petitioners are shown to stand as at common law, owners of a reversion subject to a term, they present the case expressly contemplated by Pub. Sts. c. 49, §§ 18, 19, and their right is made out. The provisions for apportionment in §§ 20, 22, are confined to estates other than and different from those for which provision is made in § 18. *Boston v. Robbins*, 121 Mass. 453. The existence of a sublease of a part of the term made by the tenant, *Boston v. Robbins*, 126 Mass. 384, or of a mortgage of her interest is not enough to throw the petitioners upon § 22. See also *Farnsworth v. Boston*, 126 Mass. 1; *Willard v. Boston*, 149 Mass. 176. Pub. Sts. c. 112, § 108, refers, primarily at least, to a case where the landowner, not a tenant, has made a mortgage.

Decree of Probate Court reversed.

FLAGG MANUFACTURING COMPANY *vs.* CHESTER
B. HOLWAY.

Suffolk. December 4, 1900. — February 28, 1901.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

In a suit in equity brought to restrain the defendant from selling zithers made in imitation of the plaintiff's, which were of a certain form and arrangement unpatented but intended for the use of patented music of which the plaintiff owned the patent, it was *held*, that the defendant might lawfully sell zithers deliberately copied from the plaintiff's if he did not represent them to be of the plaintiff's make, and that the only relief to which the plaintiff was entitled was to have the defendant ordered plainly to mark the zithers sold by him so as to indicate unmistakably that they were of the defendant's make and not the plaintiff's.

BILL IN EQUITY brought to restrain the defendant from selling zithers made in imitation of the plaintiff's, filed December 14, 1899.

In the Superior Court the case was referred to William A. Copeland, Esq., as special master, from whose report the following extracts are taken :

The bill of complaint alleges that since May, 1897, the plaintiff has been engaged in the manufacture and sale of a certain kind of musical instrument known to the trade and public as the Regent zither, and has built up a lucrative trade in the same; that one of the distinguishing features of the Regent zithers is that the strings are arranged in groups and are supported by bridges arranged diagonally on a four sided sounding board, with a straight lower edge and peculiarly curved sides and top; that with the zithers of the plaintiff are used certain patented sheets of music, the patent on which is numbered 614,775, dated November 22, 1898, and is owned by the plaintiff; that the strings of the zithers made by the plaintiff are arranged at distances one from the other, in correspondence to the distances between certain columns of characters on the patented music, and that the music so patented is sold by the plaintiff for use only on zithers of its own manufacture, and is incapable of use on any other instruments except the zithers of the defendant complained of; that as a means of holding the music in proper position on its

zithers the plaintiff has inserted in the sounding board two pins, and has punched two holes in the sheets of music made under its patents, which holes fit over the pins and hold the music in proper position with relation to the strings, and that the fact that the zithers of the plaintiff are capable of use with its patented music has become and is one of the most valuable features of the zithers made by the plaintiff.

The bill charges that since November 1, 1899, the defendant has been selling, without the license of the plaintiff, zithers, under the name of Germania Zither No. 5, not of the plaintiff's manufacture and inferior in quality to the plaintiff's zithers, but constructed and arranged with all of the peculiarities of the plaintiff's zithers, so as to be practically a fac-simile thereof, and that the defendant thereby deceives the public and causes it to believe that the zithers sold by the defendant are the zithers manufactured and sold by the plaintiff; that in addition to adopting the peculiarities of shape and construction of plaintiff's Regent Zither No. 5, the defendant has arranged the strings on the Germania Zither No. 5 in the same order and with the same spaces between them as in plaintiff's Regent Zither No. 5, thereby rendering the defendant's zither capable of use with the patented music of the plaintiff, and that this fact has further misled and deceived the public; that the adoption of the above-mentioned construction and configuration of zithers, and the arrangement and spacing of the strings by the defendant, was for the purpose of deceiving the public and causing the public to believe that the zithers made and sold by the defendant were made and sold by the plaintiff, and that the public has been deceived thereby.

The prayer is for an injunction restraining the defendant from selling zithers which imitate and simulate the zithers made and sold by the plaintiff, and zithers whose strings are arranged and spaced as are the strings made by the plaintiff, and specifically from selling zithers like defendant's Germania Zither No. 5; that the defendant be ordered to deliver to the plaintiff, or to destroy, all such zithers and advertising matter now in his possession, and to pay to the plaintiff compensation for all damages.

The defendant in his answer alleges that substantially the

same kind of instruments, under the name of zither and other names, have been manufactured and sold by various persons for many years, and the name and style are public property; that the distinguishing mark of the plaintiff's instrument is a peculiar design upon the upper surface around the opening, with the name "Regent Zither" and the company's name and place of manufacture; that the defendant has arranged the strings in the same order and with the same spaces between them as they are arranged in plaintiff's Regent zither, for the sole purpose of adapting his instrument for use with certain music patented under Letters Patent No. 452,955, dated May 26, 1891, granted to James Dodd, which patent is owned by the defendant; and that he distinguishes his zithers from the zithers of the plaintiff by plain distinguishing marks, and that he has never used the name "Regent" nor the plaintiff's peculiar figure on the sounding board above mentioned.

The master found as follows:

"An inspection of the two exhibits A and B annexed to the plaintiff's bill, being respectively the defendant's and plaintiff's instruments, shows that the outline of the defendant's zither, Exhibit A, is almost identically the same as that of the plaintiff's zither, Exhibit B, that is, a straight lower edge and similarly curved sides and top, although the body of the defendant's instrument is somewhat thinner, being $1\frac{3}{8}$ inches, while plaintiff's is $1\frac{5}{8}$ inches.

"The strings of Exhibit A are arranged in groups in the same order and of the same length and with the same spacing between them as the strings of Exhibit B.

"The strings of each are supported by bridges arranged diagonally on the sounding board and in the same relative positions, the plaintiff's bridge moulding being black, while the defendant's is gold or bronze."

Other points of resemblance and of difference between the two exhibits are then mentioned by the master.

The plaintiff contended at the hearing before the master that it was entitled to an injunction to restrain the defendant from selling or offering for sale: "1, Zithers having groups of strings arranged and spaced in imitation of Exhibit B, irrespective of the form of the instrument or of the style of label; 2, Zithers

having the configuration of Exhibit B, strung in groups of chords; 3, and, specifically, zithers having the combination of features 1 and 2, that is, having the configuration of Exhibit B and having groups of strings arranged and spaced in imitation of Exhibit B, irrespective of any variation in the label, finish or general marking."

There was no contention that the plaintiff had a patent for the mechanical construction, or for the method of stringing his zither Exhibit B, nor that he had a patent for the shape of the body of the instrument.

The master ruled:

"I rule that the principle is 'that no one shall, by imitation or any unfair device, induce the public to believe that the goods he offers for sale are the goods of another, and thereby appropriate to himself the value of the reputation which the other has acquired for his own products or merchandise.

"The question here is whether the zithers like Exhibit A, sold by the defendant, deceive or are calculated to deceive or 'to mislead and deceive the ordinary purchaser in the exercise of ordinary care and caution in such matters,' and cause him to believe that he is purchasing the plaintiff's zither.

"The plaintiff's counsel contended in effect, at the hearing before the master, that the plaintiff was the first to make a zither strung after the manner of Exhibit B; that this is the only style of instrument with which the patented music of the plaintiff is capable of being used; that having built up an extensive and lucrative trade in such zithers, the public have come to regard all zithers so strung as made by the plaintiff, and that zithers similarly strung, made by any other manufacturer, are necessarily calculated to deceive the public and should be enjoined.

"I find that the plaintiff has made instruments like Exhibit B since May, 1897; that it began putting them on the market in July, 1897, and that it has built up an extensive trade therein; that the plaintiff is the owner of Letters Patent of the United States, No. 614,775, dated November 22, 1898, for an Indicator for Stringed Musical Instruments, and referred to in the testimony as the St. John patented music, and that the zithers of the plaintiff like Exhibit B are adapted to be used in connection with the plaintiff's said patented music.

"The plaintiff contends, and its witnesses testify, that with the exception of the defendant's instruments complained of, the plaintiff's instruments are the *only* ones on which the plaintiff's said patented music is capable of being used."

The master then stated the defendant's contention that certain prior patents for music were designed for instruments similar to the plaintiff's, and said: "The only bearing, if any, in this case which those exhibits [of patented music] can have is on the question as to whether the prior patents showed instruments of the same appearance as the plaintiff's; and in my opinion they do not show sufficient resemblance to affect the decision in this case. I rule that the plaintiff has no right to the protection of this Court in a monopoly of making zithers having the mechanical features of stringing of Exhibit B broadly. Its only right is to be protected against the defendant selling zithers calculated to deceive those who think they are purchasing zithers of the plaintiff's manufacture.

"Apparently, the plaintiff's contention is that, as the plaintiff was the first to put on the market zithers strung like Exhibit B, the public have come to believe that all zithers so strung and capable of use with the St. John music are necessarily from the same source of manufacture, and therefore the plaintiff is entitled to continue such monopoly. In the absence of direct evidence of such fact, I am unable to find that they would be likely to be so misled, or that the defendant would be accountable for such erroneous understanding on the part of the public if the defendant's goods are otherwise clearly distinguishable from the plaintiff's.

"I rule that the defendant has a right to make zithers with the strings arranged in groups of chords, spaced as are the strings in Exhibit A, and adapted for use with the St. John patented music, with diagonally arranged bridges, having pins for holding the music, and having columns of numbers indicating the strings, provided his instrument is so marked as to clearly and plainly distinguish it from the plaintiff's instrument by the ordinary purchaser.

"The bill alleges that the plaintiff's patented music is sold for use only on zithers of the plaintiff's manufacture. The only evidence of this is that in one case the plaintiff refused to sell

music to a lady who said that she wished it for use with a Germania zither, and there is no evidence that the defendant had any knowledge of such conditional sales by the plaintiff, nor, in my opinion, would it be material if he did have such knowledge.

"I find no evidence of actual deceit of any purchaser, nor any evidence of actual attempt to deceive, except so far as it may be inferred from the resemblance of the two exhibits. . . .

"As to whether the plaintiff is entitled to protection in the exclusive use of zithers having the bodies shaped like those of exhibits A and B, and strung in groups of chords, I find that it is not so entitled.

"So far as appears from the evidence, the configuration of the body of the instrument, Exhibit B, was new with the plaintiff. Inasmuch as there is no evidence that the plaintiff has ever made any zithers having any different style of stringing from that of Exhibit B, and as there is no evidence that zithers having a body shaped like Exhibit B but with substantially different style of stringing would be mistaken for the plaintiff's instrument, I am not prepared to find on the evidence before me that such construction would be an infringement of the plaintiff's rights. Whether or not the grouping of the strings in chords, with spaces between them as Exhibit B, was patentably new, the general appearance of the instrument as a whole was, according to the evidence, different from anything before produced.

"As the evidence shows that the plaintiff had built up a very extensive trade in this particular style of zither, and that there were no others like it on the market up to the time the defendant's goods appeared, it is not necessary that there should be direct testimony that the public have come to recognize the goods as being the plaintiff's. Nor must actual deceit or intent to deceive be proved. It may be determined by inspection. Upon inspection of the two exhibits, A and B, it is impossible for me to escape the conclusion that the defendant, in designing his instrument, had before him one of the plaintiff's instruments, and deliberately copied it in all essential and many non-essential details, and that this was done for a wrongful purpose. . . .

"In my opinion, most purchasers would not examine carefully enough to notice the difference. The specific trademark 'Ger-

mania' is not an infringement of the specific trademark 'Regent,' and if this were a trademark case proper the plaintiff could not prevail, but as a suit in equity, to restrain unfair competition, the mere use of the word 'Germania,' as arranged in Exhibit A, does not, in my opinion, free the defendant. In the exhibits before me the 'No. 5' gives additional strength to the plaintiff's case. The evidence shows that the defendant's instruments of the style of Exhibit A, which are intended for sale, are marked 'No. 7' instead of 'No. 5.' This alone, however, does not, in my opinion, relieve the defendant. To entitle to relief it is not necessary that the imitation should be so close as to deceive persons seeing the two side by side.

"I am of the opinion that an injunction should be granted against the selling or offering for sale by the defendant of zithers like Exhibit A, unless they are so clearly and unmistakably marked as to indicate in some way that they are the product of the defendant, and not the product of the Flagg Manufacturing Company."

Exhibits A and B were the zithers themselves, A being one of those sold by the defendant and B one of those made by the plaintiff.

The following exceptions to the master's report were filed by the plaintiff:

1. The master erred in not finding that the defendant had no right to imitate the plaintiff's arrangement and spacing of the strings, including bridges and tuning pins.
2. The master erred in not finding that the defendant had no right to imitate the peculiar style of the body of the plaintiff's instrument.
3. The master erred in not finding that the defendant had no right to make, sell or offer for sale instruments simulating the plaintiff's instruments as to arrangement and spacing of strings, bridges and tuning pins, and also as to style of body.
4. The master erred in not finding that the defendant's instruments are simulations of the plaintiff's, and that defendant has no right to make, sell or offer for sale such simulations.
5. The master erred in finding that defendant had a right to make, sell and offer for sale simulations of the plaintiff's instrument on condition that such simulations are clearly and unmistakably marked so as to indicate in some way that they are the product of the defendant and not the product of the plaintiff.

After a hearing upon these exceptions, the Superior Court made the following decree: "And now this cause came on to be further heard at this sitting upon the coming in of the master's report and exceptions thereto filed by the plaintiff, and was argued by counsel, and thereupon, upon consideration thereof, no exceptions having been taken to any findings of fact made by the master, it is ordered, adjudged and decreed that the first and second exceptions be overruled, and that the third, fourth and fifth exceptions to the master's rulings as matter of law be sustained; and that an injunction issue perpetually restraining and enjoining the defendant, his agents and servants, from selling, offering for sale or disposing of any zither or zithers like the zither made and sold by the plaintiff and known as Regent Zither No. 5, and being Exhibit B of the plaintiff's bill, or in any form calculated or intended to pass off or to enable others to pass off such zither or zithers as and for the zither or zithers of the plaintiff and known as Regent Zither No. 5; and that the plaintiff recover its costs of suit to be taxed by the clerk, and that execution issue therefor in common form."

From this decree the defendant appealed to this court.

C. H. Welch, for the defendant.

J. E. Maynadier, for the plaintiff.

HOLMES, C. J. This is a bill brought to restrain the defendant from selling zithers which imitate the plaintiff's, or with strings arranged and spaced as the plaintiff's strings are arranged and spaced, and specifically to restrain it from selling a particular form of zither heretofore sold by it and exhibited by the bill. The case was sent to a master, who reported what is manifest on inspection, when the time of the respective manufactures is known, that the defendant deliberately copied the plaintiff's instrument in all essential and many non-essential details, adding that this was done for a wrongful purpose. The Superior Court made a decree for the plaintiff, in terms almost as broad as the prayers of the bill, and the defendant appealed.

We are of opinion that the decree was wrong in principle. Both zithers are adapted for the use of patented sheets of music, but the zithers are not patented. Under such circumstances the defendant has the same right that the plaintiff has to manufacture instruments in the present form, to imitate the arrange-

ment of the plaintiff's strings or the shape of the body. In the absence of a patent the freedom of manufacture cannot be cut down under the name of preventing unfair competition. *Dover Stamping Co. v. Fellows*, 163 Mass. 191. See *Singer Manuf. Co. v. June Manuf. Co.* 168 U. S. 169. All that can be asked is that precautions shall be taken, so far as are consistent with the defendant's fundamental right to make and sell what he chooses, to prevent the deception which no doubt he desires to practise.

It is true that a defendant's freedom of action with regard to some subsidiary matter of ornament or label may be restrained, although a right of the same nature with its freedom to determine the shape of the articles which it sells. But the label or ornament is a relatively small and incidental affair, which would not exist at all, or at least would not exist in that shape but for the intent to deceive; whereas the instrument sold is made as it is, partly at least, because of a supposed or established desire of the public for instruments in that form. The defendant has the right to get the benefit of that desire even if created by the plaintiff. The only thing he has not the right to steal is the good will attaching to the plaintiff's personality, the benefit of the public's desire to have goods made by the plaintiff. Probably if there were an absolute conflict between the defendant's right as we have stated it and the plaintiff's, the defendant's would prevail. *American Waltham Watch Co. v. United States Watch Co.* 173 Mass. 85, 86, 87. But the plaintiff's right can be protected sufficiently by requiring the defendant's zithers to be clearly marked so as to indicate unmistakably that they are the defendant's and not the plaintiff's goods. This is the relief which the master found to be proper, and we are of opinion that he was right. To go further is to save the plaintiff from a competition from which it has no right to be exempt.

Decree reversed. Decree to be framed overruling the plaintiff's exceptions to the master's report and enjoining the defendant from selling or offering for sale zithers like Exhibit A unless clearly marked to show that they are the product of the defendant and not the product of the plaintiff.

OLD COLONY TRUST COMPANY *vs.* GREAT WHITE SPIRIT
COMPANY & others.

Suffolk. December 5, 1900. — February 28, 1901.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

There is jurisdiction in equity in this Commonwealth to decree a foreclosure of a mortgage and to order a sale of mortgaged property, where the mortgage creates a trust with elaborate provisions for the protection of the rights of the parties in case of a breach of condition, and the property conveyed includes nearly all the property of the mortgagor consisting of real estate in two counties and a variety of articles of personal property on the mortgagor's premises in each of the two counties.

BILL IN EQUITY brought by the Old Colony Trust Company as trustee representing the holders of the bonds of the Great White Spirit Company, the first named defendant, to foreclose the mortgage and supplemental mortgages securing said bonds, filed June 22, 1899.

The following facts appeared by the bill and answers and were not controverted: The Great White Spirit Company is a corporation existing under the laws of New Jersey having authority to mortgage its property. The principal mortgage sought to be foreclosed was dated January 1, 1895, and conveyed to the plaintiff, as trustee, for the purpose of securing the payment of the principal and interest of the bonds above named, "All that certain lot of land with the buildings thereon situated in Cambridge, in the county of Middlesex, and Commonwealth of Massachusetts, on the northerly side of Cambridge Street, and bounded and described, as follows: [Description.] Together with and including all plant and machinery now on said premises. . . . Together with all appurtenances, easements, tenements, hereditaments, buildings, erections and structures now or hereafter situated upon the said real property, or connected therewith, or in any way appertaining thereto; together with all the distilling apparatus, machinery, plant, tools, equipment and fixtures of every name, nature and description whatever, now or hereafter acquired and situated or to be situated upon the said

real property, connected with or pertaining to the business now or hereafter to be carried on by the said company, whether the personal property last above-mentioned be affixed to the said real property or not. And also two other and further pieces or parcels of real property situated in the State of Massachusetts, to be acquired by the said company from Richard C. Sibley, of the City, County and State of New York; for a description of which reference is hereby made to two certain deeds [one recorded in the County of Middlesex and the other in the County of Suffolk]. Together with all the appurtenances, etc. [with the same enumeration as in the clause above quoted]. To have and hold the said property hereby conveyed or intended to be conveyed, unto the said Trustee, its successors and assigns forever. In trust, nevertheless, for the equal and proportionate benefit and security of all and every of the present and future holders of any and all bonds and interest obligations issued under and secured by this indenture, whether now issued or hereafter to be issued, without preference, priority or distinction as to lien or otherwise of any one bond or interest obligation over any other bond or interest obligation by reason of priority in issue or negotiation thereof; it being intended that the lien and security of all such bonds shall take effect from the day of the date of this indenture without regard to the date of actual issue, sale or disposition thereof. This trust to be upon the following terms and conditions": [Here follow the provisions of the trust including provisions for remedies in case of default.]

On January 28, 1895, the Great White Spirit Company, in pursuance of covenants contained in the principal mortgage, executed and delivered to the plaintiff two supplementary mortgage deeds of real and personal property, and one supplementary chattel mortgage, in trust to hold and dispose of the premises and property conveyed by the supplementary conveyances upon the terms, covenants, and conditions of the principal mortgage, for the further security and protection of the holders of its bonds.

The supplementary mortgages were as follows: A mortgage of real and personal property in Cambridge recorded with Middlesex South District Deeds, February 1, 1895; a mortgage of

real and personal property in Boston recorded with Suffolk Deeds, February 1, 1895; and a chattel mortgage covering all the personal property described in the principal mortgage and supplementary mortgages, recorded in the office of the city clerk of Cambridge, February 1, 1895.

After various proceedings not now material, a justice of this court on July 28, 1900, made a decree of foreclosure and sale. From this decree the Great White Spirit Company appealed.

It was contended in behalf of the appellant, that the decree should be reversed, on the ground that the court had no jurisdiction in equity of a bill to foreclose a mortgage, in the absence of special facts making a resort to equity necessary, and that such special facts did not exist in this case.

W. H. Dunbar, for the Great White Spirit Company.

C. K. Cobb, for the plaintiff.

KNOWLTON, J. The only question in this case is whether there is jurisdiction in equity to order a foreclosure of the mortgage by a sale, according to the terms of the decree. In *Hallowell v. Ames*, 165 Mass. 123, the general rule was stated that in the absence of special facts calling for equitable aid, the court has no jurisdiction in equity to decree the foreclosure and sale of real estate conveyed by a mortgage which does not contain a power of sale. In ordinary cases the elaborate statutory provisions for the foreclosure and redemption of mortgages, contained in the Pub. Sts. c. 181, fix the rights of mortgagors and mortgagees, and exclude resort to other methods; but when the terms of the mortgage as applied to the mortgaged property are such that the statutory provisions for foreclosure are not adequate to secure to both parties their rights, and to adjust the equities between them, the general jurisdiction of courts of equity, without reference to the Pub. Sts. c. 151, § 2, is broad enough to authorize a proper decree for foreclosure. This jurisdiction has repeatedly been recognized and exercised in this Commonwealth. *Shaw v. Norfolk County Railroad*, 5 Gray, 162. *Haven v. Grand Junction Railroad & Depot Co.* 12 Allen, 337, 341. *First National Ins. Co. v. Salisbury*, 130 Mass. 303. *Hallowell v. Ames*, 165 Mass. 123. *Old Colony Railroad v. Chadwick*, 171 Mass. 239. In the case last cited the court says, "We think there is no doubt that a court of equity under our statutes has

jurisdiction over suits to foreclose mortgages of railroads, and in such cases may order a sale of the property and franchises covered by the mortgage." In the other cases above cited, jurisdiction is assumed on general principles, without reference to the statutory provisions in regard to mortgages of railroads.

In the present case the mortgage creates a trust, and there are elaborate provisions as to the protection of the rights of the parties if there is a breach of condition of the mortgage. The property conveyed includes nearly all the property of the mortgagor, real and personal, a part of it being real estate in Middlesex County, a part real estate in Suffolk County, and the rest a variety of articles of personal property on the mortgagor's premises in Boston and in Cambridge. Because a writ of entry to foreclose a mortgage is a local action, if there should be a foreclosure by a suit under the statute, two actions would be necessary, one in Middlesex County and one in Suffolk. Separate proceedings would be necessary for a foreclosure of the mortgage on the personal property, requiring records in each of the cities where the mortgage is recorded. Pub. Sts. c. 192, §§ 7, 8, 9. For these reasons, to say nothing of other important reasons growing out of special provisions contained in the indenture of mortgage, we are of opinion that the provisions of the statute are not adequate to protect and enforce the rights of the parties in the best way, and that, therefore, there is jurisdiction in equity to order a sale of the property under the mortgage.

Decree affirmed.

EDWARD W. HOOPER & another, executors, *vs.* EDWARD
S. BRADFORD.

Suffolk. December 5, 1900. — February 28, 1901.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

The tax imposed on collateral legacies by St. 1891, c. 425 is to be assessed on the value of the testator's property at the time of his death, and not upon its value at the time of distribution.

The tax imposed on collateral legacies by St. 1891, c. 425 cannot be assessed on income derived from a testator's estate after his death.

PETITION to the Probate Court by the executors under the will of Edward Austin, late of Boston, for instructions as to the payment to the treasurer of the Commonwealth of taxes upon certain collateral legacies under St. 1891, c. 425.

The following facts were agreed: Two hundred shares of the stock of the Calumet and Hecla Mining Company owned by Edward Austin at the time of his death had a market value of \$120,000 on November 16, 1898, the date of his death, and on April 24, 1899, the date of the distribution of a portion of his personal estate, including the said shares, made in accordance with an agreement of compromise entered into concerning his estate, they had a market value of \$170,000; and the increase in the value of the entire personal estate left by him and distributed between those dates was something more than \$70,000.

It was also agreed that the income derived from the testator's estate between the same dates was about \$30,000.

In the Probate Court *Grant, J.*, made the following decree: "First. That the legacy tax is to be assessed on the value of the property as of the time of the testator's death. Second. That no tax is to be assessed upon the income which has accrued on the estate of the testator since his death."

From this decree the respondent appealed, and at the request of counsel the case was reserved by *Barker, J.*, for the consideration of the full court.

A. W. DeGoosh, Assistant Attorney General, for the respondent.

John Chipman Gray, for the residuary legatees.

HOLMES, C. J. This is a petition for instructions under St. 1891, c. 425, and comes here by appeal from the Probate Court. *Callahan v. Woodbridge*, 171 Mass. 595. The question raised and argued is whether for the purposes of the collateral inheritance tax imposed by that statute the property is to be valued as of the date of the testator's death or as of some later moment. The testator, Mr. Edward Austin, left a considerable amount of Calumet and Hecla mining stock, which rose largely in value between November 16, 1898, the date of his death, and April 24, 1899, when the stock was distributed. Between the same dates income of about \$60,000 had accrued to the estate. The treasurer of the Commonwealth claims a tax on the value of the stock at the later date, and also on the income then accrued.

A decision could be made either way without contradicting the express words of the act, or, possibly, even any very clear implication. But such indications as there are seem to us to converge toward the conclusion that the valuation is to be as of the day of the death. The language of the first section "All property . . . which shall pass by will . . . or by deed, grant, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor . . . shall be subject to a tax of five per centum of its value," naturally would be construed to mean value at the time when the property passes. Such has been the construction adopted elsewhere, although under acts no doubt more explicit than ours. *Attorney General v. Sefton*, 11 H. L. Cas. 257, 269, 271, 275, 276. *Matter of Westurn*, 152 N. Y. 93, 102. So *a fortiori* upon the view of the nature of the tax expressed in *United States v. Perkins*, 168 U. S. 625, 628, 629. The time when the property passes under a deed is not later than the death of the grantor. The same is true in the case of a will. It is true that in the latter instance the interest of a legatee is subject to an account, but still it is an interest in the fund as it is, analogous to that of a *cestui que trust*, and vests at the death of the testator. *Mechanics' Savings Bank v. Waite*, 150 Mass. 234. On this ground it is that other courts have held that income accruing after the testator's death is not liable to the tax. *Williamson's estate*, 153 Penn. St. 508, 521. As stated by the counsel for the legatees, it is not a part of the property which passes by the will.

Turning now to the later sections, by § 9 an inventory is to be filed within three months under a penalty, and by § 10 a copy of the inventory, or of the inventory of such part as is subject to the tax, "with the appraisal thereof," is to be sent by the register to the treasurer. Plainly this provision contemplates a tax on the appraised value if satisfactory to the treasurer, that is to say, a tax on a valuation that cannot be more than three months later than the testator's death, if not made as of precisely the day on which he died. So the provision in § 2 appraising within three months a life estate or term not taxable, when the remainder or reversion is subject to the tax, looks to a scheme of valuation as of a date earlier than the distribution. So the general provision in § 13 for an appraisal of the property "at its actual market value"

although it does not fix a time at which the value is to be taken no doubt permits an appraisal at any time, and expects one before two years if at all, yet it makes the valuation binding on both parties. See also *Commonwealth v. Freedley*, 21 Penn. St. 33.

It is argued that if the valuation is to be as of the date of the death, then expenses of administration, *Callahan v. Woodbridge*, 171 Mass. 595, and the United States legacy tax, *Hooper v. Shaw*, 176 Mass. 190, should not be deducted, and an expression in the latter case which certainly was not intended to convey any such idea is laid hold of as tending to fix the time when the legatee actually gets the property as the time of valuation. It is enough to say that *Callahan v. Woodbridge* implies that the value of \$10,000 in the exempting clause is to be taken as of the testator's death, deducting debts alone, although the tax is to be paid only on the amount which the legatee or successor actually would get but for the tax. A few considerations of detail might be added, but we think that what we have said is enough to justify the decree of the Probate Court.

Decree of Probate Court affirmed.

HENRY C. HALL vs. WAKEFIELD AND STONEHAM STREET RAILWAY COMPANY.

Middlesex. December 6, 1900. — February 28, 1901.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

In an action brought by a street railway conductor against his employer for an injury caused by the plaintiff coming in collision with a tree at the side of the road while stepping around a superintendent of the defendant on the running-board of an open car, it was *held*, that the existence of the tree near the track was a permanent condition of the plaintiff's employment and the plaintiff who had been in the defendant's service for some time took the risk of the danger from it, and that the presence of a person on the running-board was also an obvious and permanent incident of the plaintiff's employment of which he assumed the risk, and the fact that such person was a superintendent of the defendant even if he was engaged in superintending at the time was not material, because the superintendence as such did not contribute to the injury.

A presiding judge is not bound to rule on the sufficiency of the plaintiff's evidence to maintain the action until the evidence is closed upon both sides, but he may if he chooses take the case from the jury at any stage of the trial.

HOLMES, C. J. This is an action for personal injuries suffered by the plaintiff while acting as conductor upon one of the defendant's cars. The first count is at common law, on the ground of a failure to provide a safe place for the plaintiff, specifying the building of the track too near to a maple tree against which the plaintiff struck. The second count is under the employers' liability act, alleging a defect in the defendant's ways and works, and specifying the same facts. The third, also under the act, goes on the negligence of a superintendent. At the trial the judge directed a verdict for the defendant, and the case is here on exceptions.

The car was an open one and the plaintiff was going forward on the left hand running-board, to collect fares and to distribute transfers. A superintendent of the defendant, who was a large man, was standing on the running-board, and the plaintiff was stepping round him, and necessarily was thrown out a little further from the car than he otherwise would have been and struck the maple tree. This tree was thirty-one inches from the body of the car, and eighteen and one fourth inches from the outer edge of the running-board. On the other side of the car were poles of the defendant, so near the car that no one was allowed on the running-board on that side.

With regard to the first two counts, taking them just as they are, it is to be observed that the location of the road in Wakefield where the accident happened was not under the defendant's control but was determined by the selectmen and road commissioners of the town, and that, so far as appears, the defendant had no right to remove the tree. The argument, going outside the declaration, suggests that the defendant should have put its poles on the same side as the tree. But if such a suggestion is open and has anything in it, the short answer is that the presence of the tree was a permanent condition of the employment, and that the plaintiff, who had been in the defendant's service for some time, knew of the tree and took the risk of the danger from it, on the principle made familiar by many decisions. *Lovejoy v. Boston & Lowell Railroad*, 125 Mass. 79. *Goldthwait v. Haverhill & Groveland Street Railway*, 160 Mass. 554. *Ryan v. New York, New Haven & Hartford Railroad*, 169 Mass. 267. See *Quinn v. New York, New Haven & Hartford Railroad*, 175 Mass.

150. It is said further that, as the defendant had not rested, the case had not reached a proper stage for a ruling on its negligence, citing some words from *Fleck v. Union Railway*, 134 Mass. 480, 482. Those words had reference to a provision in the report that the verdict was to be set aside unless the plaintiff's testimony showed a want of due care on his part as matter of law, the judge having taken the case from the jury at the close of the plaintiff's testimony and seemingly not having waited for him to finish his case. Under such circumstances of course the question whether there was evidence of the defendant's negligence was not open. The language referred to does not suggest that a judge may not take the case from the jury at the close of the plaintiff's case, as here, or earlier, as there. Of course a judge may do so, although a defendant cannot except to a refusal to do so, without resting his case. *Bassett v. Porter*, 4 Cush. 487, 491. *Morgan v. Ide*, 8 Cush. 420, 422. *Wetherbee v. Potter*, 99 Mass. 354, 359.

As to the third count it is to be observed that so far as the presence of a passenger on the running-board enhanced the danger, that was part of the risk which the plaintiff assumed. The possibility of such presence there was one of the obvious and permanent incidents of the business. Of course the presence was known to the plaintiff. The facts relied on to take the case out of the general rule are that this particular passenger happened to be a superintendent and that there were seats in the car so that he might have left the running-board clear. But if the superintendent was superintending at the time, to the extent of having an eye on the way in which the car was managed, his superintendence as such did not contribute to the injury. *Joseph v. George C. Whitney Co.* 177 Mass. 176. And apart from this, it is hard to see how it matters to the defendant's liability who the particular person on the running-board was.

Exceptions overruled.

T. W. Proctor, for the plaintiff.

W. I. Badger, (S. Robinson with him,) for the defendant.

ELASTIC TIP COMPANY *vs.* ARNOLD, SCHWINN AND
COMPANY.

Suffolk. December 7, 1900. — February 28, 1901.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

In an action for the price of goods sold, it appeared that the defendant agreed to purchase the goods of A. and that the plaintiff bought out A.'s business and furnished the goods to the defendant. The defendant declared in set-off alleging that he had bought other goods of A. under a contract by which A. agreed to allow him as great a discount as that allowed to any other customer, and that A. had broken this agreement, and had been overpaid by the defendant the sums which he sought to be allowed in set-off. *Held*, that even if the novation between the plaintiff and defendant had adopted the terms of the agreement alleged in set-off, it would not follow that a claim founded on the failure of A. to allow the proper discount on sales made by him could be set off against the claim of the plaintiff for the price of goods sold by the plaintiff to the defendant.

HOLMES, C. J. This is an action for the price of three thousand pairs of forksides sold by the plaintiff to the defendant, which seems to be a corporation. The receipt of the goods and the price were admitted, but the defendant declared in set-off for discounts on tubing sold to it during the season of 1897, and also claimed a recoupment to the same amount. The facts were these. The forksides were ordered of the Chicago Tip and Tire Company on or about November 10, 1896. In March, 1897, the plaintiff bought out the Chicago Tip and Tire Company as of March 1, and after that date filled orders of the defendant to that company, sent bills in its own name and was paid by the defendant. It sent the forksides in this way, and it no longer is disputed that there was evidence on which the plaintiff was entitled to recover the amount of the present bill. But the defendant says that on November 10, 1896, it also ordered tubing of the Chicago company, the price to be seventy per cent off Shelby list "and with the understanding that you guarantee equally as favorable a price to us as made by you to any other customer during the season of 1897." The breach of the latter agreement is relied on, on the ground that the plaintiff's rights are subject to it.

The defendant asked for a ruling that "the goods for the price of which this suit is brought having been sold under the written

contract between the Chicago Tip and Tire Company and defendant, evidence showing over-payments during the whole life of the contract may be put in [in] recoupment." All that is stated concerning this request in the bill of exceptions is that "the court during the trial had ruled that evidence of sales by the Elastic Tip Company at a greater discount than seventy per cent could not be applied in reduction of the price of goods sold by the Chicago Tip and Tire Company and delivered by it to the defendant." It would seem from the form of statement that this previous ruling was not excepted to, and no further action of the court is shown, so that it is questionable whether any exception was saved or is open with regard to this request. Yet a supposed exception under it is the only one which is not abandoned.

If an exception was taken it does not appear very clearly that the alleged agreement of the Chicago Company was proved, and all that is said as to evidence of a departure from its terms by the plaintiff is that the defendant put in evidence by which it "sought to show" it. There is no evidence except by the remotest inference that the plaintiff knew of the agreement, or that the novation between the defendant and plaintiff adopted its terms.

But supposing all these preliminary difficulties to be got over, the defendant is here acquiescing in a refusal to rule that the goods were sold under the agreement referred to. So far as appears that agreement was wholly distinct from the contract for the forksides, and had nothing to do with it. If so, of course a ruling based on the opposite hypothesis properly was refused, and any question of recoupment is out of the case. The defendant was allowed to prove a set-off if it could. But even in set-off, and on the assumption that the novation between the plaintiff and the defendant had adopted the terms of the supposed agreement concerning the tubing purchase, it would not follow that by adopting them the plaintiff had agreed to sales by the Chicago company and later sales by itself being treated as one continuous dealing, so that a failure to allow the proper discount for the one could be set off against a claim for the other. The ruling of the court went no further than this proposition, if as far.

Exceptions overruled.

C. T. Cottrell, for the defendant.

C. H. Sprague, for the plaintiff, submitted the case on a brief.

JOHN C. YORSTON vs. HUNTINGTON BROWN.

Suffolk. November 14, 1900. — March 1, 1901.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

In a suit to recover the contract price for a portrait engraving of the defendant made by the plaintiff, it appeared that the defendant signed the following order on a blank furnished by the plaintiff headed by a description of a proposed edition of Gould's History of Freemasonry: "Please to execute for me a steel plate engraving from photograph furnished of myself, for which I agree to pay to you or your order the sum of \$300 upon the delivery to me of fifteen India-proof impressions from the plate; and I authorize you to copyright, print and insert the number of impressions required in the Portrait Gallery and Biographical Volume of the above named work." An advertisement of the plaintiff was put in evidence in which the defendant was named as one of "the brethren whose portraits have already been engraved or are being engraved to appear in Gould's History of Freemasonry." There was evidence that the plaintiff published a portrait engraving of the defendant in a book called "Portrait Gallery with Biographical Sketches of Prominent Freemasons throughout the United States" making no reference to Gould's History of Freemasonry. *Held*, that the heading of the blank on which the order was signed was part of the instrument and could be used to show that the defendant gave his order to the plaintiff as publisher of Gould's History of Freemasonry; that the contract being ambiguous the above named advertisement was admissible as an act of the plaintiff tending to show its meaning; that the plaintiff's agreement was to publish the defendant's portrait in Gould's History of Freemasonry; and that in order to recover the contract price the plaintiff must show that the defendant accepted the publication of his portrait in the book published by the plaintiff in place of a publication in Gould's History of Freemasonry.

CONTRACT to recover \$300 and interest thereon for a steel plate portrait engraving of the defendant made by the plaintiff, doing business under the name of John C. Yorston & Co. Writ dated August 26, 1895.

The declaration was on an account annexed to the writ as follows: "Philadelphia, Pa., Feb. 15, 1889. Huntington Brown, Mansfield, Ohio. Bought of John C. Yorston & Co. Dr.

"To Engraving Portrait of yourself to appear in The Portrait Gallery of Prominent Freemasons together with 15 India Proof Impressions of the Portrait. The plate to be delivered to you after we have printed all the Impressions required as above and according to contract, \$300. To interest at 6 % from Feb. 15, 1889, to Aug. 15, 1895, \$117. Total, \$417."

At the trial in the Superior Court, before *Richardson, J.*, the following facts appeared :

On April 25, 1889, the defendant signed the following blank furnished by the plaintiff: "The American Library Edition. Much Enlarged and Improved by American Masonic Authorities. The History of Freemasonry. Its Antiquities, Symbols, Constitutions, Customs, etc., derived from Official Records, throughout the world, by Robert Freke Gould, Past Senior Grand Deacon of England, Josiah H. Drummond, Enoch T. Carson, T. S. Parvin, and others. Superbly Illustrated. With Portraits of American and European Masonic Celebrities, Engravings of Masonic Marks, Medals, Fac-similes, Architecture, Curiosities, Events, etc.

"Mansfield, Ohio, April 25, 1889. To J. C. Yorston & Co., Publishers, New York, Cincinnati and Chicago. Gentlemen : Please to execute for me a Steel Plate Engraving from photograph furnished of myself, for which I agree to pay to you or your order the sum of Three Hundred Dollars, upon the delivery to me of Fifteen India-Proof impressions from the plate ; and I authorize you to copyright, print and insert the number of impressions required in the Portrait Gallery and Biographical Volume of the above-named work, after which the plate is to be delivered to me. I also hereby acknowledge the receipt of a duplicate copy of these conditions and order. No other agreement, written or verbal, will be recognized by Publishers, Subscriber or Agent, unless endorsed on this order. Name, Huntington Brown ; Business, Miller ; Address, Mansfield, Ohio.

"The above Impressions are to be delivered by Express C. O. D. or otherwise."

At the trial it was agreed that, in pursuance of this contract, the plaintiff executed for the defendant a steel plate engraving from a photograph of the defendant furnished by the defendant, and delivered to the defendant fifteen India-proof impressions from the plate. The plate was never delivered to the defendant, and the plaintiff contended that he held the plate because he was not through using it for the purpose of new editions of the work in which the plaintiff's portrait was published.

The portrait and biography of the defendant were not published in Gould's History of Freemasonry, which was a work

complete in four volumes. The plaintiff testified that they were published in a volume which the plaintiff contended was the Portrait Gallery and Biographical Volume of that work, but in the title of this book there was no reference to Gould's History of Freemasonry.

It appeared that the following advertisement was published as a leaflet by the plaintiff: "List of Brethren whose Portraits have already been engraved or are being engraved to appear in Gould's History of Freemasonry and Biographical Cyclopeda and Portrait Gallery of prominent Freemasons of the United States." Then followed a list of one hundred and two names, including that of the defendant.

The defendant testified: "I did receive Vol. IV. of Gould's History of Freemasonry, and there was no publication in their volume of my biography, nor was there any portrait, of any nature, of myself."

An agent of the plaintiff testified: "Mr. Brown often said to me that his portrait did not appear in the work for which it was intended; that his distinct understanding was that it was to appear in one of the volumes of Gould's History of Freemasonry. In reference to this, I desire to say that the original intention of Mr. Yorston was to publish a volume to be entitled Portrait Gallery and Biographical Volume of Gould's History of Freemasonry, to be uniform in size and binding with the aforesaid history, and to be complete in one volume: at my instance, however, the title of the work was changed, eliminating therefrom all reference to Gould's History of Freemasonry, so that the title would appear Portrait Gallery with Biographical Sketches of Prominent Freemasons throughout the United States, John C. Yorston & Company, Publishers."

At the conclusion of the evidence, the defendant requested six rulings, of which the sixth was as follows: "That if the contract stipulated that a biography of the defendant should be published in Gould's History of Freemasonry, it was not performed by a publication of the defendant's biography in some other book or volume, even though the same was similar in purpose and circulation."

The judge, among other instructions to the jury, said:

"I think his [the defendant's] sixth request, that if the con-

tract stipulated that a biography of the defendant should be published in Gould's History of Freemasonry, it was not performed by a publication of the defendant's biography in some other book or volume, even though with the same or similar in purpose and circulation; I think that is correct and that would be so, but the question is, whether the contract stipulates that. I have already stated that it seems to me the contract precedes that direction, and that the plaintiff would be entitled to recover, upon the execution of the steel plate engraving photograph of himself, and the delivery to him of fifteen India-proof impressions from the plate. He says, you notice, 'I agree to pay you or your order the sum of three hundred dollars upon the delivery to me of fifteen India-proof impressions from the plate.' He does not say upon the delivery to me of those impressions *and* the delivery of the plate to me or the publication of those impressions in a book; he goes on and makes those directions afterwards. . . .

"In addition to that, I want you to answer this question, as it may have some bearing upon the whole case: 'Did the defendant with knowledge of all the facts, and especially the fact that the biography had not been published in that particular book, promise to pay the bill of \$300 or to send a check for it?' . . . I should like to have you, in addition to your verdict, answer that question yes or no."

The jury returned a verdict for the plaintiff and to the question asked them answered "yes;" and the defendant alleged exceptions.

J. A. Brackett, for the defendant.

W. P. Foster, for the plaintiff.

LOBING, J. The order for the steel plate engraving, for which the defendant was to pay \$300, was not given to an engraver but to a publisher; it was addressed to "J. C. Yorston & Co. Publishers"; it is competent for the defendant to refer to the plaintiff's own printed heading on the blank furnished by him to the defendant for use in making out the order, to show that the order was given to him as publisher of Gould's History of Freemasonry.

This case is not like *Schenck v. Saunders*, 13 Gray, 37, which was followed by the Supreme Court of the United States in

Sturm v. Boker, 150 U. S. 312, relied on by the plaintiff; in those cases one of the parties sought to add to the terms of a contract which was clearly set forth in writing, by a statement in his own bill head, under which he had made out an invoice of the goods covered by the contract; in this case the defendant seeks to take advantage of the heading on the plaintiff's printed blank order, to show that the order was given to the plaintiff as publisher of Gould's History of Freemasonry.

The advertisement of the plaintiff, in which the defendant is named as one of the "brethren whose portraits have already been engraved or are being engraved to appear in Gould's History of Freemasonry," was an act of the plaintiff which can be considered in construing this ambiguously written document. *Menage v. Rosenthal*, 175 Mass. 358.

Taking these matters into consideration, we are of opinion that by the true construction of the written order, the steel plate engraving, for which the defendant was to pay \$300, was to be made for the publication of the likeness of the defendant in Gould's History of Freemasonry.

Were it not for the contention of the plaintiff to the contrary, it would be unnecessary to add that the plaintiff, on abandoning the publication of the defendant's likeness in Gould's History of Freemasonry, ended his right to recover the contract price. Cases like *Couch v. Ingersoll*, 2 Pick. 292, and the first rule in the notes to *Pordage v. Cole*, 1 Wms. Saund. 548, 550, have no application to a case where the plaintiff has abandoned all intention of performing his part of the contract.

The plaintiff is not entitled to have a verdict entered for him by reason of the affirmative answer given by the jury to the question put to them. It would have been competent for the plaintiff to prove that the defendant accepted a publication of his likeness in the book, published by the plaintiff, from which all reference to Gould's History of Freemasonry was eliminated, in place of a publication of it in that book. But if he wished to recover on that ground, he had to convince the jury that the defendant, knowing that under the contract he had a right to have his likeness published in Gould's History accepted in place of it, a publication in the Portrait Gallery, from which all reference to Gould's History was eliminated. No such question was

left to the jury in this case ; on the contrary, they were told that the plaintiff was entitled to recover the contract price on executing the steel engraving and delivering to the defendant fifteen India-proof impressions from it, without a publication or an intended publication of the defendant's likeness in Gould's History of Freemasonry. After giving them that instruction the presiding justice asked the jury to answer the following question : " Did the defendant, with knowledge of all the facts, and especially the fact that the biography had not been published in that particular book, promise to pay the bill of \$300 or to send a check for it ? " Though the jury under these instructions answered that question in the affirmative, they have not found that the defendant with knowledge of his rights under the written order accepted a publication in the Portrait Gallery in place of a publication in Gould's History of Freemasonry, and that answer gives the plaintiff no right to recover the contract price.

Exceptions sustained.

WALTER BROWN vs. BOSTON ICE COMPANY.

WILLIAM LYDSTON vs. SAME.

Suffolk. November 15, 1900. — March 1, 1901.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

It is not within the scope of the authority of a servant who has charge of property of his master, to inflict personal chastisement upon a person who has injured that property, in order to prevent repetition of the injury.

The driver of an ice cart, who strikes a small boy on the head with the handle of an axe, for the purpose of punishing him for breaking the axe, which was the property of the driver's employer and which he had left on the sidewalk while going into a house to deliver ice, is not acting within the scope of his employment in making the assault, and the boy cannot recover from the driver's employer for injuries caused thereby.

TWO ACTIONS OF TORT to recover for injuries alleged to have been caused by assaults made by the driver of an ice cart of the defendant. Writs dated July 26, 1898.

At the trial in the Superior Court, before *Lawton, J.*, the following facts appeared :

The plaintiffs were small boys, Brown being six years old and Lydston five years old at the time of their injuries. One Sprague was the driver of an ice cart of the defendant, and it was his duty to deliver ice to various customers of the defendant. In June, 1898, when the injuries were inflicted, a portion of Sprague's route covered Indiana Street in Boston, a cross street running between Washington Street and Harrison Avenue. Indiana Street was then undergoing repairs, and was closed to travel, and Sprague left his ice cart on Washington Street, and, for the purpose of delivering ice in Indiana Street, took a large cake of ice and with his ice tongs dragged it a little way on the north sidewalk of Indiana Street to a point near a certain house, and there cut off a piece of ice from the large cake, and went with it into the house, leaving the rest of the cake and his ice axe upon the sidewalk. The plaintiff Lydston while Sprague was away took up the axe and chopped off a little piece of ice, and dropped the axe and broke a piece out of it, and then ran toward his home, which was next door, and tried to hide behind an iron railing. When Sprague returned, the plaintiff Walter Brown, who had not meddled with the axe, and another boy, one Arthur Cole, stood near the cake of ice. Sprague picked up his axe, and upon looking at it without saying a word immediately struck the plaintiff Brown a blow upon the head with the axe handle and injured him. Arthur Cole then told Sprague that it was not Walter Brown who broke his axe, but Willie Lydston, and Sprague thereupon chased Lydston, and pulled him from behind the iron fence near the door of his house about twenty or twenty-five feet away from the cake of ice, and kicked him first about the back and then struck him several blows on the head with the axe handle, and injured him.

The mother of Lydston testified that when she asked Sprague why he did it, he answered: "Look at this axe. I'll teach him better than to break the company's tools."

The father of Brown testified that when he asked Sprague what he struck his child for, Sprague answered "Because he broke the company's axe."

At the close of the plaintiffs' evidence, the judge, at the request of the defendant, ruled that there was no sufficient evidence upon which the defendant could be held for the injuries

inflicted by Sprague upon either plaintiff, and that Sprague at the time was not acting within the scope of his authority as a servant of the defendant.

By the direction of the judge the jury returned a verdict for the defendant in each case ; and the plaintiffs alleged exceptions.

C. Abbott, for the plaintiffs.

C. C. Mellen, for the defendant.

LOBING, J. The ground on which the plaintiffs contend that the defendant is liable for Sprague's acts in beating them with the handle of the ice axe is that, from what Sprague said at the time, the jury were warranted in finding that he punished them in whole or in part for the purpose of making it easier for him to deliver ice from the defendant's ice cart in the future, without an assistant and with slight care of the tools, and therefore the case is brought within *Howe v. Newmarch*, 12 Allen, 49. But in this case Sprague's attack on the boys was an act of punishment inflicted for a past injury to his master's property, and not in doing an act which he had to do if he performed the duty owed by him to his master.

It is not within the scope of the authority of a servant, to whose custody his master's property has been confided, to undertake to secure it from future injury by committing the illegal act of inflicting personal chastisement on persons who have done damage to it in the past.

The case comes within *Bowler v. O'Connell*, 162 Mass. 319, *Driscoll v. Scanlon*, 165 Mass. 348, and in some aspects is like *Porter v. Chicago, Rock Island & Pacific Railway*, 41 Iowa, 358, and *Candiff v. Louisville, New Orleans & Texas Railway*, 42 La. Ann. 477.

Exceptions overruled.

WALLACE WILSON vs. WILLIAM P. HALE.

Norfolk. November 19, 1900. — March 1, 1901.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

An action for maliciously causing the arrest of the plaintiff, in a civil suit alleged to be groundless, is prematurely brought if the suit thus maliciously begun has not terminated. Otherwise, in an action for the malicious use of legal process in a suit founded on a just claim.

TORT for maliciously causing the arrest of the plaintiff in the State of Maine in an action of trover alleged to be groundless. Writ dated June 17, 1899.

At the trial in the Superior Court, before *Richardson, J.*, it appeared that the plaintiff and the defendant were lawyers, residing and having their offices in Boston; that in October, 1893, the plaintiff, and one George H. Johnson, a wholesale jeweller, also a resident of Boston, were appointed assignees in insolvency of the estate of one Anthoine, a retail jeweller, with assets in Massachusetts and Maine; that the defendant was Anthoine's counsel in the insolvency proceedings and held a mortgage for \$600 to secure him for his services in that connection; that after the appointment of the assignees, an agreement was made between them and the defendant, that the defendant should waive his mortgage and allow the assignees to sell the property in both States in consideration of their promise to allow him out of the estate whatever the judge of the Court of Insolvency should decide his services were reasonably worth. Soon afterwards insolvency proceedings were begun in Maine and the plaintiff and Johnson were appointed assignees in that State.

In the final account of the assignees as filed in Massachusetts no provision was made for payment of the defendant. The defendant called the attention of the Court of Insolvency to this omission and after hearing he was allowed \$100. The defendant appealed from this allowance, and on May 7, 1894, his appeal was entered in the Superior Court for the county of Suffolk.

There was evidence that on May 9, 1894, the plaintiff and Johnson were in Auburn, Maine, for the purpose of attending a

meeting of the Maine creditors at the Insolvency Court; that on that day the plaintiff and Johnson were arrested on mesne process by a deputy sheriff under a writ issued from the Supreme Judicial Court of the State of Maine, in which the defendant in this case was plaintiff; that the declaration inserted in the writ was a common law declaration in trover, alleging the conversion by the defendants therein of the plaintiff's property. The schedule annexed to the declaration contained a long list of articles of the kind usually found in retail jewelry stores. Upon the writ was a special direction to the sheriff by the present defendant's attorneys, to arrest and hold to bail unless property should be shown. The *ad damnum* was \$800. There was evidence that the plaintiff and Johnson were entire strangers in Auburn and found great difficulty in obtaining sureties on their bond. The law of Maine which permits an arrest of the person on mesne process in actions of tort without affidavit was introduced in evidence, and the defendant admitted that he was familiar with this law, and that he had directed his attorneys to bring an action of trover against the plaintiff.

In response to a question by the presiding justice at the trial, the plaintiff's counsel said that he admitted that the defendant thought he had a claim against the plaintiff and Johnson in contract; but that this claim was at the time of the arrest pending in the Superior Court in Boston and could have been sued in the Massachusetts courts at all times, but the plaintiff's contention was that the suit in Maine, while connected indirectly with this contract claim, was not brought in good faith for the purpose of obtaining security or satisfaction of any claim, but was brought for the purpose of injuring the plaintiff. There was no evidence that the suit in Maine had been terminated.

The defendant rested upon the plaintiff's evidence, and the judge thereupon directed the jury to return a verdict for the defendant upon the ground that the plaintiff's action was one for malicious prosecution and that he failed to show a legal termination of the former proceedings.

The jury returned a verdict for the defendant as directed; and the plaintiff alleged exceptions.

J. E. Hannigan, for the plaintiff, submitted the case on a brief.

W. P. Hale, *pro se*.

LORING, J. This suit was prematurely brought.

The plaintiff is right in his contention that the declaration sets forth what would have been an abuse of process had the action in which he was arrested been founded on a just claim. But he is wrong in his contention that for that reason it was not necessary to dispose of that action before bringing the one in question. He alleged and proved that the action in Maine was a groundless one, and the ordinary rule as to malicious prosecution applies, namely, that he cannot bring an action to try the issue which is raised by the former action while that issue is pending in the action of which he complains.

Not only has the plaintiff in the case at bar alleged that the suit was a groundless one, but he cannot tell the story of the wrong of which he complains without disclosing that fact. For that reason the case does not come within the rule that "it is sufficient to prove part of an allegation in a writ, if it be divisible and capable of a partial proof, provided the part proved is actionable." *Buddington v. Shearer*, 20 Pick. 477, 478.

There is no hardship on the plaintiff in requiring him to try the action in Maine before bringing this action. He must go to Maine and defend that action at some time; the necessity of doing so is the very thing of which he complains here; if he had done so, before this action was brought, the injury done him would have been made to appear more clearly than in any other way.

Exceptions overruled.

MALVINA AUDETTE, administratrix, vs. L'UNION ST. JOSEPH.

Middlesex. November 21, 1900. — March 1, 1901.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

A provision in the by-laws of a beneficiary association, requiring a sworn certificate from a physician before sick benefits can be received by a member, creates a condition precedent to the association's liability, and such requirement is not satisfied by the production of an unsworn certificate of the member's attending physician which the physician refused to swear to from conscientious scruples against furnishing a sworn certificate. *Nolan v. Whitney*, 88 N. Y. 648, is not law in Massachusetts.

CONTRACT by the administratrix of a member of a beneficiary association to recover sick benefits under its by-laws. Writ dated December 31, 1898.

At the trial in the Superior Court, before *Stevens, J.*, without a jury, it appeared that the by-law sued upon was as follows: "A member who is not disqualified and who finds himself incapable of working on account of sickness or accident shall receive from L'Union five dollars per week."

The defendant contended that it was not liable under the above by-law because the intestate did not comply with the following by-law: "No sick member can receive benefits from L'Union before three members have visited him, and these visitors have made their report to L'Union, and the member has produced a sworn certificate from a physician."

The defendant denied its liability on the sole ground that the plaintiff had failed to produce a sworn certificate from her intestate's physician, as required by the by-law above quoted.

It was agreed by the parties at the trial that the plaintiff produced for the defendant a certificate of her intestate's sickness from his attending physician which was not sworn to by the physician; that the plaintiff requested the attending physician to give her a sworn certificate, but he refused, assigning as a reason that he had conscientious scruples against furnishing a sworn certificate.

The judge found for the defendant, and also found that the failure to produce a sworn certificate was without fault or neglect on the part of the intestate on account of disability from the character of his illness; and at the request of the parties reported the case for the determination of this court. If the finding was wrong, judgment was to be entered for the plaintiff for the amount of her claim; otherwise judgment was to be entered for the defendant in accordance with the finding of the judge.

J. J. Harvey, for the plaintiff, submitted the case on a brief.

A. S. Howard, for the defendant.

LORING, J. This case comes within the rule that where one engages for the act of a stranger he must procure the act to be done, and the refusal of the stranger, without the interference of the other party, is no excuse. That rule has been applied in this Commonwealth to the obligation of a person insured under

a fire insurance policy to furnish to the fire insurance company a certificate, under the hand and seal of a magistrate, notary public, or commissioner of deeds, stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and believes that the assured has, without fraud, sustained loss on the property insured to the amount certified. *Johnson v. Phoenix Ins. Co.* 112 Mass. 49. In that case it was held that the plaintiff was not excused from producing such certificate by showing that he applied to two magistrates for such a certificate in vain, and used his best efforts to procure it, accompanied by proof of the facts which were to be certified to. And this case was confirmed in *Dolliver v. St. Joseph Ins. Co.* 131 Mass. 39, 44. To the same effect, see *Columbia Ins. Co. v. Lawrence*, 10 Pet. 507; *Ætna Ins. Co. v. People's Bank*, 8 U. S. App. 554; *Kelly v. Sun Fire Office*, 141 Penn. St. 10, 20, 21; *Daniels v. Equitable Ins. Co.* 50 Conn. 551; *Roumage v. Mechanics' Ins. Co.* 1 Green, 110; *Lane v. St. Paul Ins. Co.* 50 Minn. 227; *Home Ins. Co. v. Duke*, 43 Ind. 418; *Leadbetter v. Etna Ins. Co.* 13 Maine, 265.

The defendant relies on the reference to *Nolan v. Whitney*, 88 N. Y. 648, in *Beharrell v. Quimby*, 162 Mass. 571, 575; and to *O'Neill v. Massachusetts Benefit Association*, 63 Hun, 292. The decision in *O'Neill v. Massachusetts Benefit Association* professes to be nothing more, and is nothing more, than the application to a right to recover "sick benefits" of the rule which is established in New York in case of building contracts. But *Nolan v. Whitney* is not law in this Commonwealth. On the contrary, it is settled here that in contracts for erecting buildings or doing other work where it is stipulated that the quantity or quality of the work to be done shall be determined by an engineer or architect whose decision shall be final, it is not open to either party to show, when the engineer or architect has passed upon the question submitted to him, that he was in error and ought not to have given a certificate when he in fact gave one; *Flint v. Gibson*, 106 Mass. 391; *Robbins v. Clark*, 129 Mass. 145; or that the certificate given by him was erroneous; *Palmer v. Clark*, 106 Mass. 373; and see *White v. Middlesex Railroad*, 135 Mass. 216, 220; *New England Trust Co. v. Abbott*, 162 Mass. 148, 154.

This action, therefore, was prematurely brought; but the plaintiff, on producing a sworn certificate, unless there is some objection to it not now disclosed, can bring a new writ and recover the sick benefits now sued for.

Judgment for the defendant affirmed.

MIRIAM JACOBS vs. WEST END STREET RAILWAY COMPANY.

ISAAC JACOBS vs. SAME.

Suffolk. November 22, 1900. — March 1, 1901.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

It is not evidence of negligence on the part of a street railway company that one of its conductors standing in the middle of an overcrowded car did not come to the assistance of a woman passenger weighing more than two hundred pounds who was injured while attempting to get through the crowd and alight from the car at a transfer station of the defendant.

In an action by a woman passenger to recover for injuries received in falling to the ground while attempting to alight from an overcrowded street car of the defendant, it was *held*, that evidence that another woman immediately preceding the plaintiff in alighting from the car had her jacket torn as she was pushing her way through the crowd, rightly could be excluded as evidence involving collateral issues and too remote.

Seem, that it is the duty of the conductor of a street railway car who is on the rear platform when a passenger is alighting, to see to it that the passenger has an opportunity to alight with safety, and that it is his duty to cause passengers who are blocking the exit to stand aside or even alight from the car temporarily. Per LORING, J.

Seem, that passengers who choose to take passage on a street car which is so crowded that they have to stand on the rear platform or on the steps and thereby block the exit from the car, assume all inconveniences incident thereto, including that of temporarily alighting when necessary to allow a proper exit for passengers who wish to get off. Per LORING, J.

TWO ACTIONS OF TORT, one by Miriam Jacobs to recover for personal injuries received in falling from a street car of the defendant while attempting to alight therefrom at Roxbury Crossing in Boston, and the other by the husband of said Miriam to recover for expenses of medical attendance and nursing, and for loss of service. Writs dated October 22, 1898.

The two cases were tried together in the Superior Court, before *Lawton, J.* It appeared that the accident happened while

an overcrowded outward-bound car of the defendant was discharging and receiving passengers at Roxbury Crossing between half past five and six o'clock P. M. on February 26, 1896.

The plaintiffs introduced evidence tending to show that at the time of the accident the plaintiff Miriam was approaching the last month of pregnancy; that on the day of the accident she had gone to Boston from Jamaica Plain with two women companions; that the three had taken an outward-bound car between five and five thirty o'clock, P. M., on Tremont Street, in which they went to Roxbury Crossing; that at Roxbury Crossing they left the car; that at that time the car was "terribly crowded," all the seats being filled, two rows of passengers standing in the aisle, and the rear platform also being crowded; that people were standing in the street waiting and trying to get on, as the passengers were alighting from the car; that "there were passengers getting on and getting off"; that there "was a scuffle, a regular scuffle"; that the plaintiff and her companions were among the first of those inside the car to leave the car by the rear platform, the plaintiff being the last of the three; that other passengers were behind the plaintiff also endeavoring to alight; that the plaintiff, while on the rear platform and in the act of leaving the car, struck something over which she tripped; that her foot caught in something and that she was thrown down into the street; that at this time the car was standing still for the purpose of discharging and taking on passengers at a regular stopping place, at which transfer checks were issued; that the conductor was inside of the car, in the middle of the car, at the time the plaintiff was endeavoring to alight; that he stood there while she was alighting; that he did not come to her assistance until after she had fallen, when he assisted her to arise; that by reason of the crowd on the rear platform it was impossible for the plaintiff to get at and use the iron rail at the rear of the car; that the plaintiff's weight at the time of the accident was over two hundred pounds.

The plaintiff, as evidence of the crowded condition of the car, offered the testimony of one of her companions, who preceded her in the effort to alight, that the cloth to which a button was sewed on the jacket of this companion by reason of the crowd was torn from the adjoining cloth as she was pushing her way

through the crowd. The jacket was offered in evidence; but the judge excluded it, and the plaintiff excepted. This same witness was asked what difficulties she had in leaving the car. This question was excluded, and the plaintiff again excepted.

By direction of the judge the jury returned a verdict for the defendant in each action; and the plaintiffs alleged exceptions.

The plaintiffs contended that the judge erred in directing verdicts for the defendant, and that the jury should have been permitted to determine whether or not, upon the evidence presented, it was the duty of the conductor of the car to provide a safe avenue of egress for the plaintiff Miriam, and to render her assistance in alighting, and should have been instructed that in failing to do so he was negligent.

W. H. Wade & J. M. Merriam, for the plaintiffs.

W. B. Farr, (*M. F. Dickinson, Jr.* with him,) for the defendant.

LORING, J. This is an exceedingly close case. On the one hand as street cars are run, it is not negligent to take on passengers when all the seats are occupied, when there is no more standing room in the passageway of the car and the new passengers have to stand on the platforms and even on the steps; *Meesel v. Lynn & Boston Railroad*, 8 Allen, 234; furthermore a passenger takes the risks incident to the mode of travel he chooses to adopt, as for example the risk of being injured in the removal of an objectionable passenger from a crowded car. *Spade v. Lynn & Boston Railroad*, 172 Mass. 488. On the other hand it has been held that a street railway company may be held liable for negligence if it allows its car to be so crowded with passengers that one of them is crowded off a platform while the car is proceeding on its way. *Lehr v. Steinway & Hunters Point Railroad*, 118 N. Y. 556. *Reem v. St. Paul City Railway*, 77 Minn. 503. *Pray v. Omaha Street Railway*, 44 Neb. 167. It has also been held that the duty which a street railway owes to its passengers is not terminated until the passenger has alighted from the car, and covers the time during which the passenger is getting off; and lastly it may be that if an aged woman passenger is pushed off the step by the turbulent behavior of the crowd behind her while she is alighting from the front platform under the very eyes of the motorman, there is evidence of negligence for the jury; *Hansen v. North Jersey Street Railway*, 35 Vroom, 686;

and so also when the passenger is jostled by incoming passengers, as in *Buck v. Manhattan Railway*, 15 Daly, 48; S. C. 276, 550. See in this connection *Treat v. Boston & Lowell Railroad*, 131 Mass. 371, 373, where the presence of an excessive crowd on a train on a steam railroad is considered in a case where the train never came to a full stop at the station at which the plaintiff had a right to get off.

In the case at bar there was no evidence that the injury which the plaintiff in the first case suffered was caused by any defect in the platform, but it appeared that it was caused by the plaintiff's tripping over "something" while she was on the rear platform on her way to the street. There was evidence that the crowd on the platform made it "impossible for the plaintiff to get at and use the iron rail at the rear of the car," to steady herself as she was getting off; and it appeared "that the conductor was inside of the car," "in the middle of the car" while the plaintiff was alighting.

It may be conceded in this case that it is the duty of a conductor who is on the rear platform when a passenger is alighting to see to it that the passenger has an opportunity to alight with safety, and that it is his duty to see to it that passengers who are blocking the exit shall stand aside or even alight from the car temporarily; passengers who choose to take passage on a car which is so crowded that they have to stand on the rear platform or on the steps and who thereby block the exit from the car, assume all inconveniences incident thereto, including that of temporarily alighting, when necessary, to allow a proper exit for passengers who wish to get off. It also may be conceded that the conductor's duty requires him when not otherwise engaged to be on the rear platform. But a conductor has duties to perform which take him away from the rear platform, and the greater the number of passengers the longer the time during which it is necessary for him to be absent and properly absent from it. The duty of collecting tickets, for example, being one which cannot always be postponed, is a duty which in a crowded car requires the conductor to be absent from the platform a good deal and for some length of time, and if a passenger wishes to alight while the conductor is so engaged, the inconvenience which she may endure in having to alight without his aid is one of those

inconveniences which the passenger assumes by choosing to travel on a street car at a time of day when it is notorious that such conveyances are crowded.

There is no evidence in the case at bar that this conductor was negligent in being absent from the rear platform when the plaintiff was alighting. Unless the plaintiff is entitled to go to the jury on the ground that the company should provide some one in addition to the conductor and motorman to care for the car and its passengers, there was no evidence of negligence in this case. As street cars are run we do not think that the omission to employ a third person could be found to be negligence.

The fact that the place where the plaintiff was getting off is a place where passengers are transferred to other lines makes no difference; no distinction can be drawn between the duties devolving upon a street railway company when stopping at such a place for passengers to alight and those which they have when they stop at other places. Neither does the fact that the plaintiff weighed over two hundred pounds make a difference; the mere fact that a woman weighs over two hundred pounds cannot make it the duty of the conductor to drop all other duties and help her get off.

Neither is it material that there was evidence that there were passengers "trying to get on, as the passengers were alighting from the car" and "that there 'was a scuffle, a regular scuffle.'" There was no evidence that the plaintiff was jostled by anybody; it appeared that the injury was caused by her tripping over something.

For these reasons we are of opinion that there was no evidence on which the jury could find that the defendant was negligent.

We are also of opinion that the plaintiff's exceptions to the exclusion of evidence must be overruled. The fact that the cloth to which a button was sewed on the jacket worn by the companion of the plaintiff who got off the car just before the plaintiff fell in attempting to do so, was torn from the adjoining cloth as she was pushing her way through the crowd and by reason of the crowd, was rightly excluded; it is plain that the evidence could have been properly excluded as evidence involving collateral issues and too remote. *Collins v. Dorchester*, 6 Cush. 396. *Dean v. Murphy*, 169 Mass. 413.

Exceptions overruled.

COMMONWEALTH vs. THOMAS D. TATE.

Worcester. November 26, 1900. — March 1, 1901.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

At the trial on a complaint for keeping intoxicating liquors with intent unlawfully to sell the same, it appeared that the defendant was a retail druggist licensed as a pharmacist and also holding a liquor license of the sixth class authorizing him to sell intoxicating liquors for medicinal, mechanical and chemical purposes not to be drunk on the premises. Officers, entering the defendant's premises on a Sunday, found a number of men in a back room connected with the defendant's drug store, several of them having bottles of beer in their hands, and in a closet of the same room which was unlocked by the defendant were found a washtub containing a large piece of ice and in the water surrounding it twenty-seven bottles of beer, and in a refrigerator eighteen more bottles of beer, and there were in all in the closet about fifty-one gallons of beer in four hundred and ten bottles and two hundred and sixty empty beer bottles, one and a half gallons of whiskey in three jugs and thirty gallons of whiskey in a barrel, one quart of wine, two gallons of rum, one gallon of gin, and one pint of sherry, also on top of one of the barrels a tumbler and a glass. *Held*, that there was sufficient evidence to warrant the jury in finding that the defendant kept intoxicating liquors with intent unlawfully to sell the same.

If a defendant in a criminal case which comes to the Superior Court on appeal has a right to have a separate copy of the complaint against him in the court below go to the jury without the judgment entered on it, in order that his case may not be prejudiced by the jury's knowing of his conviction in the court below, this practice is sufficiently complied with by giving the jury a copy of the complaint and record of conviction with a blank paper pasted over the record of conviction.

COMPLAINT for keeping intoxicating liquors with intent unlawfully to sell the same, received and sworn to July 15, 1900.

At the trial in the Superior Court, before *Stevens, J.*, it appeared that the defendant was a retail druggist at Clinton, licensed as a pharmacist and also holding a liquor license of the sixth class, authorizing him to sell intoxicating liquors for medicinal, mechanical and chemical purposes not to be drunk on the premises. The premises consisted of two rooms, the front room being an ordinary drug store equipped as such. The rear of this front room was somewhat elevated, being reached by two or three steps, and there was what was described as a prescription desk. From the portion of the room so set apart for the prescription desk a door opened into another room in the rear.

One corner of this room was partitioned off in the form of a closet. On Sunday, July 15, 1900, several police officers entered the premises under a search warrant and found there the condition of things described in the opinion of the court.

At the conclusion of the Commonwealth's evidence, the defendant rested and offered no evidence but submitted the following requests for rulings:

1. That upon the entire evidence, the jury are not warranted in finding a verdict of guilty, and the defendant must be acquitted.
2. That there is no evidence to warrant a finding by the jury of any illegal sale of intoxicating liquors.
3. That upon the occasion of the visit of the officers there is no evidence to warrant a finding that any sale of liquors was made by the defendant.
4. That evidence of a sale without competent evidence tending to prove such sale illegal, cannot be taken to the prejudice of the defendant as tending to prove his guilt on this complaint.
5. That the mere possession of liquors by the defendant is no evidence tending to prove his guilt on this complaint.
6. That under the licenses of the defendant, put in evidence, the defendant had a right to keep and expose liquors for sale, and unless it be proved by competent evidence that the defendant kept such liquors for prohibited or unlawful use he cannot be convicted.
7. That the mere keeping of liquors is no evidence of guilt of the defendant, the government must prove by some competent evidence of sales an unlawful intent of the defendant, and to establish such intent that actual sales by the defendant or some one for whom he is responsible have been made, showing that such sales were made by the defendant actually knowing or believing that the liquors were bought for an illegal purpose.
8. In order to prove that the defendant has made an illegal sale of intoxicating liquor, the government must prove not only that the liquor was really bought for an unauthorized purpose, but also that it was sold by the defendant with guilty knowledge or belief.

The judge refused to give the rulings numbered 1, 2 and 3, and among other instructions instructed the jury as follows:

That "the mere keeping of intoxicating liquors by the defendant was no evidence of his guilt, unless they were kept in such a way, under such circumstances, or in such quantities as to be in-

consistent with use under his license. That is to say, he had a right to keep liquors on his premises for the purpose of using them under the provisions of his license, but he had not a right to keep them there for any other purpose, and he is guilty under this complaint if you are satisfied that he kept them there for the purpose of illegal sale. He has no right under his license to sell them to people resorting there for a beverage. . . .

“That under the license the defendant had a right to keep and expose liquors for sale upon the premises where they were found, and unless it be proved by competent evidence that the defendant kept such liquors for unlawful use, he cannot be convicted.

“In order to prove that the defendant has made an illegal sale of intoxicating liquors, the government must prove not only that the liquors were bought for an unauthorized purpose, but that they were sold by the defendant with guilty knowledge and belief. That is to say, not only must there have been an illegal intent on his part when he sold the liquors, but there must have been an illegal intent upon the part of the person who purchased them.

“The mere possession of liquors by the defendant is no evidence tending to prove his guilt on this complaint. I have given you that instruction substantially, gentlemen; I give it to you now in connection with that. Unless they are kept in such a manner, in such quantities as to lead you to believe and to satisfy you that they were kept for an illegal purpose.”

No exception was taken to the charge except in so far as the instructions to the jury were inconsistent with the defendant's requests for rulings. To the refusals to give the specific requests asked for, and to the instructions as given inconsistent therewith, the defendant excepted.

After the charge of the judge and before the jury retired, the defendant objected to the complaint and record of his conviction going to the jury. The judge thereupon suggested that the jury might consider the case without their taking the complaint or the record of conviction to the jury room. But to this the defendant objected on the ground that the jury could not return a verdict without having the complaint before them in the jury room, and insisted that the complaint must go to the jury. The

judge thereupon directed the clerk to paste a paper over the record of conviction of the defendant on the back of the complaint, so that that part of the record could not be read by the jury. To this the defendant objected, but the judge, subject to the exception of the defendant, directed the clerk as above, and the clerk did as directed; and the complaint, with the blank paper pasted over the record of conviction, was delivered to the jury, who took it to the jury room.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

H. Parker & D. I. Walsh, for the defendant.

R. Hoar, District Attorney, & *G. S. Taft*, Assistant District Attorney, for the Commonwealth.

LOURING, J. In this case the government introduced evidence that the defendant was a druggist, and that on a certain Sunday in the middle of July several officers entered the prisoner's premises under a search warrant and found, in a room which was a part of those premises and which was back of the room used as a drug store, a number of men, several of whom had bottles containing lager beer in their hands; that in the corner of this room there was a closet, which was unlocked by the prisoner, and in it the officers found a washtub containing a large piece of ice, some water, and twenty-seven bottles full of lager beer; and also a refrigerator in which were eighteen more bottles of beer. That in this closet there were in all about fifty-one gallons of beer in four hundred and ten bottles, full or partly empty, two hundred and sixty empty beer bottles, one and one-half gallons of whiskey, in three jugs, thirty gallons of whiskey in a barrel, one quart of wine, two gallons of rum, one gallon of gin, and one pint of sherry; and also that on top of one of the barrels there was a tumbler and a glass something like a "Moxie" glass.

This was sufficient evidence to warrant the jury in finding that the prisoner kept intoxicating liquors with intent unlawfully to sell the same. *Commonwealth v. Berry*, 109 Mass. 366, and cases there cited. *Commonwealth v. McNeese*, 156 Mass. 231.

In this case, the government contended that the jury would be warranted in finding on these facts that the beer in the hands of the persons found in the room had been illegally sold. We think that contention was right. Though the prisoner was on the

other side of the door when the officers entered, we think the jury were warranted in finding that the beer in the bottles found in the hands of the men when the officers entered had been delivered to them to be used as a beverage with the prisoner's knowledge, and being delivered in a store, the jury were warranted in finding that it had been illegally sold. *Commonwealth v. Mandeville*, 142 Mass. 469.

The prisoner's seventh request was sufficiently complied with by the instructions given by the court. *Commonwealth v. Canny*, 158 Mass. 210.

Even if the prisoner had a right to what is given him by the practice referred to in *Commonwealth v. Keenan*, 140 Mass. 481, in submitting to the jury a separate copy of the complaint, so that his case will not be prejudiced by the jury's knowing what the judgment of the lower court was (which we do not intimate to be the case) he cannot complain of the action which was taken in the case at bar.

Exceptions overruled.

FRANK G. COOK, administrator, *vs.* RUTH RICHARDSON.

Middlesex. December 4, 1900. — March 1, 1901.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

It is not a legal defence to an action on an alleged claim, that the plaintiff has signed an entry of judgment satisfied for a sum less than his claim and also a release of all claims recited to be in consideration of the payment of the lesser sum, and has subsequently refused to receive the lesser sum or to deliver the instruments, and if these facts constitute an equitable defence, that does not deprive a court of equity of its jurisdiction to enjoin the prosecution of the action at law and to order the defendant to deliver the instruments of discharge to the plaintiff.

The estate of an intestate amounted to about \$5,000. All claims against the estate except one disputed claim amounted to about \$700. On the disputed claim a suit was brought for about \$15,000. The administrator represented the estate insolvent, and the Court of Insolvency on his petition made a decree ordering a proof of claims under Pub. Sts. c. 137. Thereafter the administrator by a compromise settled the suit on the disputed claim for \$200, thereby making the estate solvent. *Held*, that the administrator had power to make the compromise, and that this power was not taken away by the apparent insolvency of the estate and order of the court for proof of claims, and that the assets of the estate having

proved sufficient to pay all claims, it became the duty of the administrator under Pub. Sts. c. 137, § 22, to pay all claims in full; and he was given a decree against the other party to the compromise ordering its enforcement.

BILL IN EQUITY by an administrator to enforce the specific performance of an agreement of compromise to settle two pending suits against the estate of his intestate for \$200, filed February 26, 1900.

The estate had been represented insolvent, but if the compromise was allowed it would be solvent. The compromise was approved by a decree of the Probate Court and there was no appeal pending from that decree. The case was heard by *Holmes*, C. J., who found that the plaintiff was entitled to the relief sought, subject to two questions of law raised by the defendant, who asked for the following rulings: "1. That there was no jurisdiction because the remedy at law or in the two original suits was adequate. 2. That, the estate having been represented insolvent after one of the two actions referred to had been begun, the administrator had no authority to agree to a settlement and could not be authorized by the Probate Court to settle the suits which he was defending."

These requests the Chief Justice refused, and ordered a decree for the plaintiff, subject to the question whether his rulings were right, and at the defendant's request reported the case for the consideration of the full court, such decree to be entered as the court might think fit.

The bill alleged, that on June 8, 1897, the plaintiff was appointed and qualified as administrator of the estate of Lucy Torrey, late of Cambridge in the county of Middlesex; that on or about January 25, 1900, the plaintiff as administrator was the defendant in two actions of contract brought by the defendant in the Superior Court for that county; that as a result of overtures from the present defendant to the present plaintiff, the defendant made an oral agreement with the plaintiff to settle and compromise the two suits and to release all claims against the plaintiff and the estate of his intestate for the total sum of \$200 to be paid by the plaintiff to the defendant upon the plaintiff obtaining as soon as might be the assent of the judge of probate to the compromise; that in pursuance of this agreement, on January 24, 1900, the defendant executed three in-

struments drafted by the plaintiff, copies of which were annexed to the bill as exhibits, and left these instruments in the hands of her counsel to be delivered to the plaintiff upon the payment of the sum of \$200 agreed upon. [These exhibits consisted of entries, in one suit of judgment for the plaintiff for \$200 and judgment satisfied, and in the other suit of judgment for the defendant, and of a release of all claims in consideration of the payment of the sum of \$200 by the plaintiff. All three documents were signed by the defendant.] That also in pursuance of the agreement, on January 27, 1900, the plaintiff filed in the Probate Court a petition praying for the assent of that court to the compromise, and after service of citation thereon, on February 20, 1900, the judge of probate allowed the petition.

The bill then alleged notice to the defendant of the granting of the petition and tender of the \$200 and refusal by the defendant to receive that sum or to deliver the instruments or to carry out the terms of the agreement of compromise.

The plaintiff alleged that he had no complete and adequate remedy at law, and prayed: 1st. That the defendant be ordered forthwith to receive the said sum of \$200 and deliver to the plaintiff the said three instruments marked as exhibits and specifically to perform the terms of her said agreement. 2d. That the defendant be enjoined from any further prosecution of either of said two actions of contract described as aforesaid. 3d. That the plaintiff have such other and further relief as equity or the circumstances may require.

The answer among other matters set forth, that the defendant did not understand the meaning and nature of the instruments annexed to the bill as exhibits, and that immediately after and before January 7, 1900, when she fully understood the contents of said exhibits the defendant instructed her counsel not to deliver the originals of said exhibits or to receive any money therefor.

The answer further alleged that if all the matters and things set forth in the plaintiff's bill of complaint were true the plaintiff had a full, complete and adequate remedy at law, that is to say, that the originals of the exhibits set forth and annexed to the bill ought to be pleaded in bar to the actions in the Superior Court named in the bill and not in the court of equity.

The answer further alleged that the plaintiff as administrator on November 11, 1897, filed a petition in the Court of Insolvency in and for the County of Middlesex, praying that court to declare the estate of Lucy Torrey insolvent, and that on November 23, 1897, the Court of Insolvency made a decree ordering a proof of claims in that court; that several meetings of the creditors of Lucy Torrey were held under and by virtue of that decree, and that the decree was still in full force; that by reason of this decree and the proceeding in insolvency the plaintiff as administrator was barred from making any compromise agreement or settlement with the creditors of Lucy Torrey, and that all proceedings must await the final decree of the Court of Insolvency.

The decree of the Court of Insolvency annexed to the answer was dated November 23, 1897, and was as follows: "On the representation of Frank G. Cook, administrator of the estate of Lucy Torrey, late of Cambridge in said County of Middlesex, deceased, it appearing that the estate of said deceased will probably be insufficient for the payment of her debts; it is decreed, that the court receive and examine all claims of creditors against the estate of said deceased, and that the register make a list of all claims laid before said court, with the sum allowed on each claim, and certify the same. Six months are allowed creditors to present and prove their claims. All claims allowed to be adjusted by finding the net amount due May 26, 1897, the date of death of the deceased."

M. F. Farrell, for the defendant.

F. G. Cook, *pro se*.

LORING, J. 1. The objection that the administrator had an adequate remedy at law is not well taken. It was not a valid legal defence to the actions at law that Mrs. Richardson agreed to accept \$200 in compromise of the claims there sued on, so long as she refused to accept the money; and the fact, if it is a fact, that the relief sought by this bill in equity could have been as effectually set up in those actions as an equitable defence, does not deprive this court of its jurisdiction to entertain the bill, to enjoin the prosecution of the actions at law, and to direct the defendant to deliver the formal discharge agreed upon. *New York, New Haven & Hartford Railroad v. Martin*, 158 Mass. 313, 315.

2. We are of opinion that the administrator had authority to make the compromise in question, which disposed of all the claims upon which the representation of apparent insolvency was based and which, in fact, made the estate solvent.

No provision is made in the statute for compounding and settling controversies where the estate of a deceased person has been represented to be apparently insolvent and a decree of the Probate Court has been made granting a commission, or, as in the case at bar, directing proof of claims to be made in the court itself. In this respect, the provisions of the statute are unlike the provisions in case of an insolvent debtor, see Pub. Sts. c. 157, § 57, and it may be for that reason that ordinarily no compromise can be made of a controversy, in case of the insolvency of the estate of a deceased person which involves the payment by the estate of a sum of money.

But it is expressly provided by Pub. Sts. c. 137, § 22, that if, when the list of allowed claims is complete, the assets prove sufficient to pay all such claims, the administrator shall pay them in full without any order of the Probate Court, and if any other debt is afterwards recovered against him he shall be liable therefor only to the extent of the assets then remaining. It appears by the representation of insolvency made in this case that the assets of the estate amounted to \$4,889.90, after paying the funeral expenses, which amounted to \$187.50. The claims against the estate were the charges of administration, estimated at \$700, and the claim of the defendant, amounting to \$14,895.36 and sundry claims to the amount of \$34.01.

It appears from Pub. Sts. c. 137, § 22, that when the amounts prove sufficient to pay all debts it is the duty of the administrator to pay them without any order or direction from the Probate Court. By the compromise of the defendant's claim amounting to \$14,895.36 by payment of \$200 the estate was made abundantly solvent, and it thereby became the duty of the administrator to pay all claims in full, without further order or direction of the Probate Court. We are of opinion that the power of an administrator to make a compromise which renders the estate solvent is not taken away by a representation of apparent insolvency followed by a decree for a commission, or, as in this case, by an order for proof of claims to be made before

the court itself, and the right of the administrator to make the compromise apart from the representation of apparent insolvency is plain. *Thayer v. Kinsey*, 162 Mass. 232, 235. *Chadbourn v. Chadbourne*, 9 Allen, 173.

It follows that the plaintiff is entitled to a decree in accordance with the prayers of his bill.

So ordered.

HENRY P. EMERSON vs. BENJAMIN GERBER.

Suffolk. December 10, 1900. — March 1, 1901.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

Seem, that notice to a creditor of an assignment for the benefit of creditors and a subsequent receipt by the creditor of a check from the assignee purporting to be a final dividend intended to be accepted in full discharge of the creditor's claim, and use of the check by the creditor, are not enough to show an assent on his part to an agreement of composition, and he may sue for and recover the balance of his claim. Whether the assignee could recover back the amount of the dividend if the creditor repudiated the condition on which it was paid, *quære*.

CONTRACT for a balance alleged to be due for goods sold and delivered. Writ dated September 30, 1898.

The case was heard in the Superior Court by *Mason*, C. J., on agreed facts, which were as follows: There was no dispute as to the fact that the goods were sold, or that the price charged was the price agreed upon. Some time after the price became due the defendant executed and delivered an assignment of all his estate to Plummer C. Spring for the benefit of all creditors who should assent to the assignment, and a copy of the assignment was "duly recorded." The assignment contained a provision that all creditors assenting to it thereby discharged all their claims against the debtor in consideration of the right of receiving the dividend from the assignee. The assignment was assented to by nearly all the creditors in number and amount. Notice of the assignment was mailed to all creditors immediately after it was made, stating that creditors who wished to receive dividends must assent to the assignment. The assignee sold

all assets for an amount which was about sufficient to pay a dividend of twenty-five per cent. The assignee subsequently sent out his checks to the creditors assenting to the assignment containing twenty-five per cent dividends, and also sent his check on August 5, 1898, to the plaintiff, and the assignee would testify that in the envelope containing the check was enclosed a blank release, a copy of which was annexed to the bill of exceptions. The plaintiff would testify that he had no recollection of having received this unsigned release. The plaintiff used and appropriated the check, and then brought suit against the defendant for the balance. The plaintiff's bill was for \$69.92. The defendant mistakenly had believed that the bill due was for \$53.16, and the check sent to the plaintiff was for twenty-five per cent of the latter amount, the defendant and assignee not knowing at the time that the plaintiff claimed a larger amount. When the plaintiff received the check he said nothing and used it. The plaintiff would testify that he had mailed bills of all goods sold to the defendant, and that he had sent to the defendant previous to his assignment a correct statement of his account. The assignee would testify, if competent, that he sent the check to the plaintiff, believing that the plaintiff would accept it in discharge of his bill.

The blank release annexed to the bill of exceptions was as follows: "Received from Plummer C. Spring, Assignee of Benjamin Gerber, trading as B. Gerber & Co., of Boston, Mass., the sum of dollars, the same being dividend of 25% upon our claim against said Gerber. And we do hereby release and discharge said Benjamin Gerber of and from all actions, debts, notes and accounts which we now have against him. And we do hereby release said Plummer C. Spring from all demands which we may have against him as assignee aforesaid. In witness whereof we hereunto set our hands and seals this fifth day of August, A. D. 1898."

The defendant requested the Chief Justice to rule and to find as follows: 1. That upon the agreed statement of facts, including legitimate inferences, judgment should be for the defendant. 2. That the court must find from the statement of facts that the plaintiff knew he released the debtor by assenting to the assignment. 3. That the plaintiff received the blank release

together with the check. 4. That the plaintiff understood or must have understood, that the check was sent to him to retain upon the condition of his discharging the debtor and the assignee. 5. That by retaining the check he assented to the assignment, or must be deemed to have assented to the assignment, and thereby discharged the defendant. 6. That under the law prevailing since this assignment was made requiring copies of assignments to be recorded with the records of the city clerk, and upon the fact that such a copy was duly recorded, the plaintiff is charged with constructive notice of the terms of the assignment, especially after receiving notice that such an assignment was made, and that he must assent to the assignment if he wished to receive any dividends.

The Chief Justice refused the defendant's requests and found and ruled: 1. That the assignment by the defendant to Plummer C. Spring for the benefit of such creditors only as should assent to the same was not an assignment in conformity to St. 1887, c. 340, providing for the distribution of the defendant's property in substantial conformity with the provisions of the law relating to insolvent debtors. 2. That the plaintiff never expressly or by implication assented to the assignment to Spring. 3. That the plaintiff had not released his claim or accepted any payment in full satisfaction of the same.

The Chief Justice further found and ordered judgment for the plaintiff in the sum of \$61.84; and the defendant alleged exceptions.

M. L. Lourie, for the defendant.

D. B. Beard, for the plaintiff.

HOLMES, C. J. This is an action upon an admitted debt, and the only defence is that the plaintiff accepted a check for a part of the debt from an assignee for the benefit of creditors under circumstances which made it a discharge of the whole. The assignment provided that all creditors assenting to it thereby discharged their claim against the debtor. Notice of the assignment had been mailed to all creditors with a statement that those who wished to receive dividends must assent to the assignment. In the agreed statement of evidence it appears that the assignee would testify that he sent with the check a blank release, purporting to be under seal and to release the

debt upon receipt of a dividend of twenty-five per cent. But by mistake the check was for considerably less than twenty-five per cent, and the plaintiff would testify that he had no recollection of having received the release. In short, there is nothing sufficient as matter of law to compel the judge to whom the evidence was submitted to find that the plaintiff understood that he was receiving the check in discharge of his whole claim. Thus the defence fails at the outset on the facts before we reach any question of law.

As the check of the assignee was not received as the obligation of a third person but as representing the money into which it immediately was to be and was converted, and as that money was understood to be and was the proceeds of the debtor's property, it is hard to see how in any event the receipts of it alone could have prevented the creditor from suing to recover the rest of his debt. *Curran v. Rummell*, 118 Mass. 482. Whether the money could be recovered, if the creditor repudiated the condition on which it was paid, is another matter. See *Trecy v. Jeffs*, 149 Mass. 211; *Bruce v. Anderson*, 176 Mass. 161, 162. But more than a simple receipt of the check with knowledge of that condition would be required to bring in the peculiar doctrine of the Massachusetts cases as to the effect of an agreement which forms part of a composition in which several creditors join. *Farrington v. Hodgdon*, 119 Mass. 453, 457. *Perkins v. Lockwood*, 100 Mass. 249, 250. Compare *Cottage Street Methodist Episcopal Church v. Kendall*, 121 Mass. 528; *Sherwin v. Fletcher*, 168 Mass. 413.

Exceptions overruled.

THOMAS H. MULDOON vs. CITY OF LOWELL.

Middlesex. December 11, 1900. — March 1, 1901.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

Section 3 of St. 1896, c. 415, creating a department of supplies under the amended charter of the city of Lowell, provides that all material and supplies shall be purchased by the chief or head of that department, subject to the approval of the mayor, and that all bills for material and supplies shall state among other things the quality and quantity of articles purchased and received. *Held*, that the inspection of supplies is within the scope of the department, and that the chief of the department has authority to appoint an inspector whose duties are to inspect any goods furnished under a contract made by the chief of the department, and to see that the goods purchased are delivered and correspond in quality and quantity with the contract.

Under St. 1896, c. 415, amending the charter of the city of Lowell, the chief of the department of supplies elected by the voters of the city under § 8 of that act has authority to employ as many subordinates as the business of his department may seem to him to require, provided he does not exceed the appropriation made for his department by the city council.

CONTRACT to recover the sum of \$222 for services performed by the plaintiff for the city of Lowell when employed as an inspector by the chief of the department of supplies of that city. Writ dated May 20, 1899.

At the trial in the Superior Court, before *Lilley, J.*, the following facts were admitted or proved: That Andrew E. Barrett, who employed the plaintiff, was the duly elected, qualified and acting chief of the department of supplies of the city of Lowell under St. 1896, c. 415, § 3, and continued to hold that office up to the time of the trial; that, assuming to act for and on behalf of the city as the head of the department of supplies, he employed the plaintiff as an inspector of supplies, no specific period of employment being agreed upon, and promised him for such services the sum of \$3 a day, which was a reasonable compensation.

The services which the plaintiff was employed to perform are fully stated in the opinion of the court. The plaintiff on February 15, 1899, entered upon this employment and performed the services required of him for a period of seventy-four days. At the time of the plaintiff's employment and at the time of

the trial there was a sufficient sum of money appropriated for and standing to the credit of the department of supplies of the city to pay for the plaintiff's services.

Jeremiah Crowley, mayor of Lowell, testified for the defendant, that before the employment of the plaintiff he had an interview with Barrett, the chief of the supply department, in which Barrett informed him, that he intended to appoint the plaintiff as an inspector, and he, Crowley, informed Barrett that in his opinion there was no necessity for any such officer, that Barrett had no right to employ him and that if he did so, he, the mayor, would not sign any pay-roll on which the plaintiff's name appeared.

At the close of the evidence, at the request of the defendant's counsel, the judge ruled that Barrett, as chief of the department of supplies of said city, was not authorized to make the contract declared on, and directed a verdict for the defendant, and at the request and by agreement of both parties ordered that the case be reported for determination by this court. Pursuant to this order, *Lilley, J.* having resigned since the trial, the case was reported by *Lawton, J.* for the consideration of this court. If on all the evidence the judge erred in directing a verdict for the defendant, then judgment was to be entered for the plaintiff in the sum of \$222, with interest thereon from the date of the writ. Another question was reported in regard to the exclusion of certain evidence offered by the plaintiff, but the decision of the court has made this immaterial.

D. J. Donahue, for the plaintiff.

F. W. Qua, for the defendant.

HAMMOND, J. The only question is whether Barrett, the chief of the department of supplies, had the power as such to hire the plaintiff. The first objection to the validity of the appointment urged by the defendant is that the services which the plaintiff was hired to perform were not within the scope of the department of supplies as set forth in St. 1896, c. 415, § 3, which, so far as material to this point, is as follows: "There shall be a department of supplies, and all material and supplies for the city shall be purchased by the chief or head of such department, subject to the approval of the mayor. . . . All bills for material and supplies shall show the date of purchase, date

of delivery, the unit of price, the quality and quantity of articles purchased and received, the number and date of the order for purchase." The services which the plaintiff was hired to perform were, to inspect any goods that were furnished the city under a contract made with the chief of the department of supplies when requested so to do ; to see that the goods purchased were delivered to the city and that they corresponded in quality and quantity with the contract ; to visit the several city departments and ascertain and report to the chief of the supply department whether goods ordered had been received and corresponded in quality and quantity with the contract ; he also, in some instances, attended to the weighing of coal, where there was no sworn weigher, and also on some occasions went into the cars and shovelled over the coal to see that it was of the proper quality and quantity ; in some cases he measured lumber, and if there was delay in the delivery of the goods, looked after the same and caused them to be delivered ; and if there was a dispute with respect to any bill rendered for supplies, he visited the head of the department and reported the same to the chief of the department of supplies. In the absence of any provision to the contrary we think that the duty to purchase supplies included the duty to see that the supplies delivered corresponded in quality and quantity with the contract of purchase. It was as much the duty of the purchasing agent to see that he got what he purchased as to make a contract to get it. The full contract of purchase was not completed until the goods called for by the contract had been delivered, and it was his duty to see that that was done. The plaintiff's work was within the scope of the section. He made no contracts but assisted only in the matter of inspection.

The defendant further contends that the statute does not authorize the chief of the supply department to increase the number of men employed in his department, or to fix their compensation without special authority from the city council, and in support of that contention it argues that the provision of the fifth section "that the heads of the several departments and offices shall have the power to employ and to discharge all subordinate officers and employees in their respective departments" does not authorize the head of a department to employ any num-

ber of men in his department at his pleasure, or to fix their compensation, but that "the power to determine how many subordinate officers and employees there shall be in any department remains with" the city council.

Prior to the statute under consideration the revised charter of the city, St. 1875, c. 173, provided in § 2 that the administration of the fiscal, prudential and municipal affairs of the city should be vested in a mayor and city council; in § 16, that the mayor should be the chief executive officer; in § 17, that the city council should elect certain officers therein named, and should also elect in such manner as should be determined by ordinance all other officers necessary for the good government, peace and health of the city not otherwise provided for, the duties of such officers to be such as are required by ordinance, and their compensation to be fixed by the city council; and in § 23, that all other powers, excepting some not material to the point under consideration, now vested in the city or inhabitants thereof, should continue to be vested in the city council.

In this charter the only department spoken of as such is the fire department (§ 31), but, in the various ordinances which were in force at the time the statute of 1896 was passed, several of the divisions under which the business of the city was carried on were therein called departments. In addition to the fire department, mention is made of the police department (Rev. Ord. of 1894, c. 29); and the department of the superintendent of streets (c. 36); and in c. 38, it is made "the duty of each of the standing committees to exercise a close supervision over all matters of detail, relating to their respective departments" (§ 3); they were authorized to make contracts relating to their respective departments under certain restrictions (§ 4), and certain of the committees, especially those on streets and on sewers, were expressly authorized to determine as to the number of laborers to be employed in their respective departments, and if in their judgment the interest of the department required it, to create and discontinue positions of authority in the department subordinate to that of superintendent; but the direction of any committee over its department was not to extend so far as to permit the committee or any member thereof directly or personally to employ or discharge any officer or workman

employed therein. §§ 7, 10, 11, 12, 14, 16, 19. Without going further into detail it is sufficient to say that under the ordinances the work of the city was divided into sections called departments, and that the business of each department, including the purchase of supplies and material, was carried on by the chief officer under the direction of the appropriate standing committee of the city council.

In this state of affairs St. 1896, c. 415, was passed. Its plain purpose was to take from the city council much of the direct power of control which through its standing committees it had theretofore exercised over the various departments of the city, and to vest the power in the respective heads of the departments, and further to stop the purchase of material and supplies by several agents, and to have all such purchases made by one department.

It establishes a department of supplies and provides that all material and supplies for the city shall be purchased by the head of said department subject to the approval of the mayor. The chief is neither appointed by the mayor nor elected by the city council, but is elected by the voters at the annual municipal election. § 3.

It will be seen that the statute works a radical change in the policy respecting the purchase of supplies. A special department is created not by an ordinance under the general authority of the city council to carry on the affairs of the city, but by an act of the Legislature amending the charter, and as if to make the change more marked the head of this department owes his position neither to the mayor nor the city council, except so far as he may be removed or suspended under the second section of the statute. Under the statute the heads of the several departments have the power to appoint and employ and to discharge all subordinate officers and employees in their respective departments (§ 5); and they have the charge and management of the business thereof except as respects the purchase of material and supplies (§ 6), but they cannot exceed the appropriation previously voted by the city council. § 8. Each chief may employ the men that the business of the department may seem to him to require, and he may discharge them, provided always he does not exceed the appropriation. To him is given the power,

and upon him rests the responsibility for its exercise. To hold otherwise and to adopt the contention of the defendant that the number of men to be employed is to be regulated by the city council obviously would hamper seriously the management of the departments, as for instance that of streets, and it seems to us inconsistent with the general scope as well as the express language of the statute. The checks upon the head of the department are to be found in the provision that he shall not exceed the appropriation, and that he may be removed as provided in the second section of the statute. He is given the power but he exercises it at his peril, for he may at any time be called to account by the mayor or city council. According to the terms of the report there must be

Judgment for the plaintiff for \$222, and interest from the date of the writ.

WILLIAM W. FORBES *vs.* NEW YORK LIFE INSURANCE
COMPANY.

Suffolk. January 7, 1901. — March 1, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

The provision of St. 1897, c. 472, § 1 that "In civil causes in which any questions or issues are submitted to a jury a verdict shall not be set aside except upon a motion in writing of one of the parties specifying the grounds relied upon in support of it" has no application to the setting aside by a judge of a verdict which he himself previously has ordered. He has power to do this of his own motion.

CONTRACT by the assignee of a life insurance policy issued by the defendant upon the life of Freeman F. Weatherbee and payable according to its terms to his representatives. Writ dated April 12, 1898.

The defendant filed a petition under St. 1886, c. 281, representing that liability was admitted, and the amount thereof was not in dispute, and that the amount due from the defendant was claimed by persons other than the plaintiff, and in response to

an order of notice Thomas F. Scanlan and Ann Weatherbee appeared and became parties defendants.

At the trial in the Superior Court, before *Gaskill, J.*, the claimant Scanlan waived his claim, and there remained as claimant only Ann Weatherbee. The claimant offered in evidence, in support of her right to recover, and the defendant in support of its interpleader, a policy of life insurance on the life of Freeman F. Weatherbee, issued by the defendant, dated March 9, 1864, payable to Ann Weatherbee as beneficiary, and other evidence. Upon the plaintiff's objection, the judge excluded this evidence, and directed the jury to return a verdict for the plaintiff. The claimant and the defendant excepted to the refusal of the judge to admit the evidence, and to the ordering of the verdict. The verdict was returned on November 3, 1899. On June 19, 1900, although no party to the action had filed a motion in writing to set aside the verdict, and while the exceptions of the claimant and the defendant were still pending, the judge of his own motion and without request from any party and against the plaintiff's objection, ordered that the verdict be set aside, and a new trial had. The order of the judge was as follows: "In above-entitled action I ruled as matter of law that the plaintiff was entitled to recover, and directed the jury to return a verdict for the plaintiff. I am satisfied that said ruling and direction were erroneous, and now in exercise of the power and authority inherent in the court, I set aside said verdict and order a new trial, the defendant consenting thereto, the plaintiff objecting thereto."

The plaintiff alleged exceptions.

John Ballantyne, Jr. & James Ballantyne, for the plaintiff, submitted the case on a brief.

W. A. Morse & I. R. Clark, for the defendant.

MORTON, J. The court had power of its own motion to order the verdict to be set aside. Pub. Sts. c. 158, § 6. *Ellis v. Ginsburg*, 163 Mass. 143, 146. It is not necessary to consider St. 1897, c. 472, for the reason that no questions or issues were submitted to the jury.

Exceptions overruled.

JOHN F. WHEELER & another vs. A. W. KLAHOLT
& another.

Suffolk. January 7, 1901. — March 1, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

A presiding judge may require a party who has filed exceptions and a motion for a new trial based on the same questions of law, to elect upon which he will proceed, and may refuse to hear the motion unless the party waives his exceptions; but if the judge does not require such election, the fact that the party filing exceptions has argued the same points of law on a motion for a new trial does not prevent the allowance of his exceptions.

Goods were shipped by A. to B., an intending purchaser, but after their receipt the contract of sale was repudiated by both parties. A. then wrote to B. that he could keep the goods "at the price you offer if you send us net spot cash at once. If you cannot send us cash draft by return mail, please return the goods to us immediately." B. sent a draft to A. for the price less four per cent. A. returned the draft saying that there was no deduction of four per cent and "if not satisfactory please return the goods at once by freight" via a certain railroad named. A. heard nothing more until thirty-five days later, when he was notified by the railroad company that the goods had arrived. The appearance of the returned goods showed that they had been handled and somewhat defaced. *Held*, that there was evidence of a sale to go to a jury, B.'s failure to return the goods promptly being evidence of an acceptance of A.'s terms although the requirement of immediate payment was not complied with, A. having the right to waive this if he saw fit.

CONTRACT for the price of certain shoes alleged to have been sold to the defendants. Writ dated October 23, 1899.

At the trial in the Superior Court, before *Lawton, J.*, it appeared that the defendants had negotiated with an agent of the plaintiffs for the purchase of the shoes. As a result of these negotiations the shoes were shipped by the plaintiffs from Boston, and on August 9, 1899, were received by the defendants at their place of business in Springfield, Illinois. After the shoes were received by the defendants, it was found that the plaintiffs and defendants had different understandings as to the terms of the purchase, and that if there ever had been a contract it was repudiated by both the plaintiffs and the defendants after the goods were received by the defendants upon their premises. After the repudiation, and while the goods were on the premises of the defendants, there was a correspondence between the parties, which is described in the opinion of the court, in which the

plaintiffs offered to sell at a certain price "spot cash" with the condition that if the offer was not accepted the goods should be returned immediately. The defendants sent a draft for the price less four per cent. The plaintiffs returned the draft, saying that there was no such deduction from the price and "if not satisfactory please return the goods to us immediately." The defendants without replying retained possession of the goods more than a month and then returned them, as more fully stated in the opinion. These facts were relied on by the plaintiffs to prove a sale.

The jury returned a verdict for the plaintiffs; and the defendants alleged exceptions, raising the question whether there was evidence of a sale to justify the verdict.

The verdict above mentioned was rendered May 23, 1900, and on May 24 the defendants filed a motion for a new trial, alleging, 1, that the verdict was against the law; 2, that the verdict was against the evidence and the weight of evidence.

The motion was heard May 25, and in support of their first reason for asking for a new trial the defendants alleged their requests for rulings and the judge's refusal thereof as shown in the bill of exceptions, and argued the same at length. On June 12, the motion for a new trial was overruled. June 9, the defendants filed their exceptions. At the hearing on the allowance of the bill of exceptions subsequently to June 12, the plaintiffs objected to the allowance of any bill of exceptions on the ground that the defendants, by alleging and arguing at length, at the hearing on the motion for new trial, the same requests and refusals to rule as set out in the bill of exceptions, had waived their exceptions. The defendants had not been at any time required to elect whether they would rely on their motion for a new trial or on their bill of exceptions, and had not waived their rights to their bill unless on the foregoing facts they must be held to have waived them. The judge ruled that the defendants had not waived their rights; and to this ruling the plaintiffs alleged exceptions.

E. H. Crandell, Jr., for the plaintiffs.

W. F. Kimball, for the defendants.

HOLMES, C. J. This is an action for the price of one hundred and seventy-four pairs of shoes, and the question raised by the

defendants' exceptions is whether there was any evidence, at the trial, of a purchase by the defendants. The plaintiffs contend that the defendants waived their exceptions by presenting and arguing a motion for a new trial upon the ground, among others, of the proposition of law on which their exceptions are based, they not having filed their exceptions until afterwards. The plaintiffs excepted to a ruling that the defendants had not waived their rights. The judge did not require the defendants to waive their exceptions as a condition of entertaining their motion so far as it went on the same ground, and there is nothing to show that his ruling on this preliminary point was not entirely right. *Anthony v. Travis*, 148 Mass. 53, 57.

The evidence of the sale was this. The shoes had been sent to the defendants on the understanding that a bargain had been made. It turned out that the parties disagreed, and if any contract had been made it was repudiated by them both. Then, on September 11, 1899, the plaintiffs wrote to the defendants that they had written to their agent, Young, to inform the defendants that the latter might keep the goods "at the price you offer if you send us net spot cash at once. If you cannot send us cash draft by return mail, please return the goods to us immediately via Wabash & Fitchburg Railroad, otherwise they will go through New York City and it would take three or four weeks to get them." On September 15, the defendants enclosed a draft for the price less four per cent, which they said was the proposition made by Young. On September 18 the plaintiffs replied, returning the draft, saying that there was no deduction of four per cent, and adding, "if not satisfactory please return the goods at once by freight via Wabash & Fitchburg Railroad." This letter was received by the defendants on or before September 20, but the plaintiffs heard nothing more until October 25, when they were notified by the railroad company that the goods were in Boston.

It should be added that when the goods were sent to the defendants they were in good condition, new, fresh and well packed, and that when the plaintiffs opened the returned cases their contents were more or less defaced and some pairs of shoes were gone. It fairly might be inferred that the cases had been opened and the contents tumbled about by the defendants, al-

though whether before or after the plaintiffs' final offer perhaps would be little more than a guess.

Both parties invoke *Hobbs v. Massasoit Whip Co.* 158 Mass. 194, the defendants for the suggestion on p. 197 that a stranger by sending goods to another cannot impose a duty of notification upon him at the risk of finding himself a purchaser against his own will. We are of opinion that this proposition gives the defendants no help. The parties were not strangers to each other. The goods had not been foisted upon the defendants, but were in their custody presumably by their previous assent, at all events by their assent implied by their later conduct. The relations between the parties were so far similar to those in the case cited, that if the plaintiffs' offer had been simply to let the defendants have the shoes at the price named, with an alternative request to send them back at once, as in their letters, the decision would have applied, and a silent retention of the shoes for an unreasonable time would have been an acceptance of the plaintiffs' terms, or, at least would have warranted a finding that it was. See also *Bohn Manuf. Co. v. Sawyer*, 169 Mass. 477.

The defendants seek to escape the effect of the foregoing principle, if held applicable, on the ground of the terms offered by the plaintiffs. They say that those terms made it impossible to accept the plaintiffs' offer, or to give the plaintiffs any reasonable ground for understanding that their offer was accepted, otherwise than by promptly forwarding the cash. They say that whatever other liabilities they may have incurred they could not have purported to accept an offer to sell for cash on the spot by simply keeping the goods. But this argument appears to us to take one half of the plaintiffs' proposition with excessive nicety, and to ignore the alternative. Probably the offer could have been accepted and the bargain have been made complete before sending on the cash. At all events we must not forget the alternative, which was the immediate return of the goods.

The evidence warranted a finding that the defendants did not return the goods immediately or within a reasonable time, although subject to a duty in regard to them. The case does not stand as a simple offer to sell for cash received in silence, but as an alternative offer and demand to and upon one who was sub-

ject to a duty to return the goods, allowing him either to buy for cash or to return the shoes at once, followed by a failure on his part to do anything. Under such circumstances a jury would be warranted in finding that a neglect of the duty to return imported an acceptance of the alternative offer to sell, although coupled with a failure to show that promptness on which the plaintiffs had a right to insist if they saw fit, but which they also were at liberty to waive.

Exceptions overruled.

CATHERINE A. HILL vs. SUPREME COUNCIL AMERICAN
LEGION OF HONOR, ELLEN WHITE, claimant.

Suffolk. January 7, 8, 1901. — March 1, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

A fraternal beneficiary corporation had the following by-law: "In the event of the death of all the beneficiaries selected by the member before the decease of such member, if no other or further disposition thereof be made in accordance with the provisions of these by-laws, the benefit shall be paid to the widow and children of the member in equal shares; if none, then to the heirs of the deceased member, and if no person or persons shall be entitled to receive such benefit it shall revert to the Benefit Fund." *Held*, that where a member died without widow, children or heirs at law, and the corporation waived the claim of reversion to its benefit fund, the executor of the deceased member might be admitted as a party to a suit on the certificate, in order to enable him to raise the question whether there was a resulting trust.

Under the provision of St. 1894, c. 367, § 8, that where the wife, children, father, mother, brothers and sisters of a member of a fraternal beneficiary corporation have all died, his certificate may be transferred to "any other person," the member may designate a stranger as the beneficiary, and such designation will not be rendered void by the fact that it was made upon an agreement that the beneficiary should pay the dues and assessments of the member. The provision of the section above named that "No contract under this section shall be valid or legal which shall be conditional upon an agreement or understanding that the beneficiary shall pay the dues and assessments, or either of them" applies only to the original making of the contract, and not to the subsequent transfer of a certificate originally valid. Whether the prohibition applies to a case where the benefit society is not a party to the agreement or understanding that the dues are to be paid by the beneficiary instead of the member, *quære*.

CONTRACT against a fraternal beneficiary corporation to recover \$1,000 alleged to be due to the plaintiff under a benefit

certificate issued by the defendant to William Leahey, deceased. Writ dated April 14, 1899.

At the trial in the Superior Court, before *Maynard*, J., the corporation admitted its liability, and under St. 1886, c. 281, petitioned that Ellen White be summoned in and made a claimant. This petition was upon motion allowed, and Ellen White duly appeared and claimed the fund.

In his original application for membership in the corporation, William Leahey requested that his certificate be issued payable to his wife, Kate Leahey, and on January 30, 1884, a certificate was issued by the corporation to William Leahey, payable to his wife, Kate Leahey. Among other things the certificate contained the provision that it was issued "upon condition that said Leahey comply in the future with the laws, rules and regulations now governing the said council and fund, or that may hereafter be enacted by the Supreme Council to govern said council and fund."

Kate Leahey died, and thereafter on August 28, 1894, William Leahey surrendered his first certificate, and applied to the corporation for a new certificate, requesting that it be issued and made payable to one Catherine A. Hill, the plaintiff. The corporation on September 8, 1894, issued the benefit certificate sued upon, which was made payable to Catherine A. Hill as dependent friend. The original application for membership and the two certificates of membership and the application for the change in membership were introduced in evidence at the trial.

It was admitted at the trial that the plaintiff was not related to William Leahey, nor dependent upon him; that all dues and assessments had been received by the corporation, and that William Leahey was in good standing in the corporation at the time of his decease.

The plaintiff introduced in evidence the charter and laws of the corporation which were in force on September 8, 1894. The only portions material were as follows:

"Certificate of Incorporation, Clause fifth . . . to establish a benefit fund from which, on the satisfactory evidence of the death of a member of the Order who has complied with all its lawful requirements, a sum not exceeding five thousand dollars

shall be paid to the family, orphans or dependents as the member may direct. . . .”

Law 119, Beneficiaries to be named. “Applicant must enter upon the application the full name or names of beneficiaries, husband or wife, child, affianced husband, affianced wife, relatives of or persons dependent upon the applicant whom it is desired to make beneficiaries.”

“129, Change of Benefit Certificate. Members in good standing may surrender their benefit certificates and have new ones issued subject to the provisions of these by-laws, such change to be made upon petition to the supreme secretary, signed by the member desiring to make the change, attested by the secretary under the seal of the council in accordance with the forms prescribed. Each petition shall fix the time when the change of beneficiary shall take effect, and when no time is stated such change shall take effect on the date of the delivery of the application for change to the secretary of the council.”

“31, Executive Committee, Duties. The executive committee shall have such powers as the statutes of Massachusetts provide, and perform such duties as the by-laws direct or as shall be from time to time prescribed by the Supreme Council by resolution or otherwise.”

The plaintiff further introduced in evidence the laws of the corporation which were in force at the time of the decease of William Leahey, and among these laws was the following: “118. In the event of the death of all the beneficiaries selected by the member before the decease of such member, if no other or further disposition thereof be made in accordance with the provisions of these by-laws, the benefit shall be paid to the widow and children of the member in equal shares; if none, then to the heirs of the deceased member, and if no person or persons shall be entitled to receive such benefit it shall revert to the Benefit Fund.”

Law 120 prescribed the form of application for a new certificate on surrender of an existing certificate, and was in force both in 1894, at the time of issuing the certificate to the plaintiff, and also in 1898, at the date of Leahey's death.

The plaintiff further introduced evidence tending to show that after the passage of St. 1894, c. 328, incorporated in § 8 of St.

1894, c. 367, which went into effect on April 28, 1894, the executive committee of the defendant authorized the supreme secretary to issue new certificates in accordance with the provisions of that law when any member should apply therefor; that William Leahey applied for a new certificate in August, 1894, and on September 8, 1894, the certificate in suit was issued to him; that at that time the corporation, through its supreme secretary, had knowledge that the plaintiff was neither a relative of nor dependent upon William Leahey, and, further, that at that time Leahey, if he should then de cease, had no heirs-at-law; that the defendant was doing business under and in accordance with St. 1888, c. 429, referred to in St. 1894, c. 328.

It was admitted and agreed at the trial that William Leahey, at the time of his de cease, had no heirs-at-law, and that the claimant, Ellen White, had never in any manner been named or designated as beneficiary by William Leahey, and that she was not related to him.

At the close of the plaintiff's case, the claimant offered evidence tending to show: First, that the plaintiff was not a person within the classes entitled under the statutes of this Commonwealth and under the laws, regulations and rules of the defendant order, to be designated a beneficiary in said benefit certificate; Second, that the designation of the plaintiff as beneficiary was made upon an agreement or understanding that the beneficiary should pay the dues or assessments of said deceased member in the defendant order, and that said designation was illegal under the statutes of this Commonwealth; Third, that the claimant was the sister-in-law of said Leahey, and had been a member of said Leahey's family for about twenty-five years prior to his death; that the claimant was entirely dependent upon said Leahey for support, and was the only person dependent upon him after the death of his wife; that the claimant was a member of said Leahey's family, and entirely dependent upon him for support at the time of the alleged designation of the plaintiff as beneficiary, and that the claimant continued to be a member of said Leahey's family and entirely dependent upon said Leahey for support down to the time of his death; Fourth, that the claimant was the sole legatee and executrix under the will of Leahey.

The judge ruled that the evidence offered by the claimant was

not competent or material, and excluded it, and ruled that the claimant had no standing in court in this action on either of the grounds claimed, namely, as a dependent or as a legatee.

The claimant then moved to amend the pleadings so as to allow her to become party claimant in the capacity of executrix of the estate of William Leahey, deceased, but it appearing that there were no heirs of William Leahey living at the time of his decease, the judge disallowed the motion as a matter of law on the ground that if she was admitted as claimant defendant, then, as executrix, she would have no standing in court and would not be entitled as executrix to the fund.

The judge thereupon ordered a verdict for the plaintiff for \$950, that being the amount agreed upon between the plaintiff and the defendant corporation; and the claimant, Ellen White, alleged exceptions.

The defendant corporation did not claim the fund under its law 118 above quoted or otherwise, and was not represented at the argument.

J. J. Irwin, (*W. W. Risk* with him,) for the claimant.

M. P. Beckett, for the plaintiff.

LORING, J. The claimant has no standing in her own right; she has no claim as a dependent, because she was not designated by the member as the beneficiary; nor as an heir, for she was not a relative of the member, and a legatee is not an heir. But the claimant's rights in her representative capacity as executrix of the estate of the member cannot be disposed of on this ground. If the benefit society represents those interested in the benefit fund to whom under the provisions of By-law 118 the benefit reverts in case the members die without heirs and without having designated some one to receive the benefit, and the society waives that reversion, it may be that the benefit would fall into the estate of the member by way of resulting trust. But see *Eastman v. Provident Mutual Relief Association*, 62 N. H. 555; *Maryland Mutual Benevolent Society v. Clendinen*, 44 Md. 429. As the pleadings now stand we cannot say that the society has not waived the claim of the benefit fund; it has admitted its liability to pay the benefit, has summoned in as claimant Ellen White, and has made no claim to the benefit itself. We cannot say that Ellen White, as she is executrix of the estate of

William Leahey the member, is not entitled to be heard on the questions raised by the pleadings as they stand.

We are of opinion, however, that the designation of the plaintiff was legal, and for that reason the claimant's motion to amend so as to become a party as executrix was rightly refused. The designation of the plaintiff was made under St. 1894, c. 367, § 8, which provides that in case of the death of wife, child, father, mother, brothers or sisters the certificate may be transferred to "any other person," and was not rendered void by the fact, if it was a fact, that the designation of the plaintiff as beneficiary was made upon an agreement or understanding that the plaintiff should pay the dues and assessments of the member. The provision of St. 1894, c. 367, § 8, is that "No contract under this section shall be valid or legal which shall be conditional upon an agreement or understanding that the beneficiary shall pay the dues and assessments, or either of them." This must be construed to be limited to the contract whereby the person on whose death the benefit is payable becomes a member of the beneficiary society, and to forbid the making of that contract on condition that the dues are to be paid by the beneficiary and not by the member; the clause does not in terms cover the designation on that condition of a stranger to be the beneficiary, where the contract was originally legal and the member's interest in continuing his membership has gone with the death of his relatives. It well may be that the Legislature intended to forbid the first but not the second, and the language used by it goes no further than to forbid the first.

It is not necessary to consider whether a case comes within the prohibition of the statute where the benefit society is not a party to the understanding that the dues are to be paid by the beneficiary in place of the member.

Exceptions overruled.

MICHAEL HEALEY vs. GEORGE E. LOTHROP.

Suffolk. January 8, 1901. — March 1, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

A special police officer appointed under St. 1878, c. 244, § 6, by the city of Boston on the application of the proprietor of a place of amusement to serve without pay from the city, is not the servant of such proprietor, and, if he commits an assault while in the discharge of his duties, the only remedy against the proprietor is on his bond to the city treasurer required by that section, making the proprietor liable to parties aggrieved by any official misconduct of such police officer. It is not necessary or possible to get any preliminary judgment against such proprietor before proceeding upon the bond. Whether it is necessary to get a judgment against the officer before so proceeding, *quære*.

TORT against the proprietor of a place of amusement for an assault and battery committed by a special police officer appointed by the city of Boston under St. 1878, c. 244, § 6, on the application of the defendant, and alleged to be in his employ. Writ dated March 16, 1895.

The defendant was the proprietor of a place of amusement in Boston called the Grand Dime Museum. On his application the Board of Police Commissioners of the city of Boston had appointed one Mead, by whom the assault was alleged to have been committed, a special police officer under St. 1878, c. 244, § 6, to serve without pay from the city. The defendant had given to the city treasurer the bond required by the section named, to be liable to parties aggrieved by any official misconduct of such police officer to the same extent as for the torts of agents and servants in his employment. The section provides that "proceedings may be had upon said bonds in the same manner as upon the bonds of constables."

At a previous stage of this case, in a decision reported in 171 Mass. 263, this court decided that Mead was not the servant of the defendant. After that decision the plaintiff amended his declaration by adding a second count setting forth the facts about the appointment of Mead as a special police officer and the giving of the bond by the defendant, and alleging that Mead under said appointment and while in the discharge of his duties as such officer assaulted the plaintiff.

At a new trial in the Superior Court, *Maynard, J.* ruled that on the evidence the action could not be maintained on either count. By his direction the jury returned a verdict for the defendant on both counts; and the plaintiff alleged exceptions.

In behalf of the plaintiff it was argued that a judgment against the defendant was a necessary preliminary to a suit on the bond, while an action against Mead would not be conclusive against either the defendant or the sureties on his bond.

A. M. Pinkham & E. Lowe, for the plaintiff.

C. F. Eldredge, for the defendant.

HOLMES, C. J. This is an action of tort against the keeper of a place of amusement in Boston, seeking to make him liable for alleged official misconduct of a special police officer upon his premises. The first count is for an assault and battery on the plaintiff, treating the special policeman as the defendant's servant. That was disposed of when this case was here before. 171 Mass. 263. There was no evidence put in or offered which tended to show that the officer was acting as the defendant's servant apart from the statute. After the decision by this court the plaintiff added another count setting forth the appointment of the special police officer on the defendant's written application and bond, (under St. 1878, c. 244, § 6, now repealed, St. 1898, c. 282, § 4,) and alleging an assault and battery by the officer while in the discharge of his duties in the defendant's theatre. In other words the plaintiff attempted to evade the former decision by a slight change in the words of his declaration, and by suggesting that although the police officer was not the defendant's servant the defendant was liable for his official misconduct to the same extent as if he were. The scope of our decision was wider, and disposes of the new count as well as of the old one. The only remedy against the defendant for the misconduct as such is on his bond. Whether or not it is necessary to get a judgment against the police officer before proceeding upon the bond, as in the case of a Boston constable, (St. 1814, c. 165; *Calder v. Haynes*, 7 Allen, 387,) there is no such necessity for a judgment against the defendant, and, as we once before have decided, there is no ground for a judgment against him in the act. St. 1878, c. 244, § 6.

Exceptions overruled.

GEORGE W. CASTON & another vs. ETTA E. QUIMBY
& another.

Suffolk. January 9, 1901. — March 1, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

A person employed to procure a mortgagee who will lend \$2,000 for three years does not earn a commission by procuring one who will lend the sum named only on the insertion in the mortgage of a clause that the principal and interest shall be payable in gold.

CONTRACT to recover \$40 as a commission for procuring a loan for three years upon certain real estate of the defendants. Writ dated October 5, 1899.

In the Superior Court the case was heard upon agreed facts and judgment entered for the plaintiffs; and the defendants appealed to this court.

The agreed facts were as follows: The defendant, Etta E. Quimby, the owner of certain land at Malden, made an application by her husband and agent, Israel P. Quimby, to the plaintiffs to procure a loan of \$2,000 upon a mortgage of her property in Malden. The plaintiffs thereupon applied to the Woodlawn Cemetery trustees, and those trustees, by attorney, drew a mortgage deed of the premises to be executed and signed by the defendants. In the mortgage deed presented to the defendants was what is called a gold clause, namely, "that the principal and interest named in said mortgage should be paid in gold." Thereupon the defendants refused to execute the mortgage deed, for the sole reason that it contained the gold clause. There was no agreement written or verbal between the plaintiffs and the defendants, at the time of the application for the loan or thereafter, that the mortgage should or should not contain a gold clause.

If the plaintiffs were entitled to recover upon the agreed facts, it was agreed that judgment might be entered for the plaintiffs in the sum of \$40 and costs; otherwise judgment to be for the defendants with costs.

J. M. Browne, for the defendants.

R. G. Kilduff, for the plaintiffs.

LORING, J. The plaintiffs in this case have not earned a commission. They were employed by the defendants to find some one who would lend them \$2,000 on a mortgage of land. That means \$2,000 to be repaid in whatever is by the laws of the United States legal tender.

The plaintiffs did not succeed in finding such a person; the person produced by them was not willing to lend on the terms stated by the defendants but insisted on inserting a clause "that the principal and interest named in said mortgage should be paid in gold." That means that it can be paid only in gold. *Bronson v. Rodes*, 7 Wall. 229. *Independent Ins. Co. v. Thomas*, 104 Mass. 192.

The customer produced by the brokers not being ready to do what the principal stipulated for and not being accepted by the principal, no commission is due. *Fitzpatrick v. Gilson*, 176 Mass. 477.

The plaintiffs may be right in saying that, in view of the fact that the country is now on a gold basis and is likely to remain so for the three years the mortgage was to run, the defendants were unreasonable in the stand they took; if they were unreasonable, the plaintiffs' customer would seem to have been equally so. But whether either or both were unreasonable is not material. The defendants had the right to insist that the plaintiffs did not bring themselves within their offer; if they did not they have not earned a commission whether the defendants were or were not reasonable.

Judgment for the plaintiffs reversed; judgment to be entered for the defendants.

WALTER AUSTIN, trustee, & others vs. FANNY S. WHITTLE
& another.

Suffolk. January 9, 10, 1901. — March 1, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

A school-teacher without paying rent or board lived in a boarding-house kept by her grandmother, whose lease had expired and been extended, assisted her grandmother in keeping the boarding-house, and received from her a bill of sale of the household goods and furniture in the house. It was found as a fact by a judge sitting without a jury, that what the granddaughter did in and about the house was only to assist her grandmother, and that she had never agreed to pay rent and was not a party to any plan to defraud the lessor. *Held*, that all requests for rulings as to the liability of the granddaughter for use and occupation of the premises jointly with her grandmother had been made immaterial by the findings of fact.

CONTRACT against Fanny S. Whittle and Charlena D. Hoyt jointly and severally, for the use and occupation of a dwelling-house at 5 Walnut Street in Boston, for one year from September 1, 1897, to August 31, 1898. Writ dated May 25, 1899.

At the trial in the Superior Court, before *Richardson, J.*, without a jury, the following facts appeared: The defendant Whittle was a boarding-house keeper and the defendant Hoyt was her granddaughter. The grandmother had kept a boarding-house for many years, and in 1892 first occupied the plaintiffs' house, No. 5 Walnut Street. She executed a lease with the plaintiffs for five years and one month, which lease expired August 31, 1897. She used the house as a boarding-house for another year, having obtained an extension of the lease by an instrument under seal for that period of time, which was the period for which the plaintiffs sought to recover rent. The defendant Hoyt lived with her grandmother in the house during that year on terms of the closest intimacy, and helped her in the business to a certain extent. She was a teacher in a kindergarten school in Boston.

On July 29, 1896, the defendant Whittle gave to the defendant Hoyt a bill of sale which was recorded in the city clerk's office, conveying "all the household goods, furniture and chattels in the house situate on Walnut Street, in said Boston, and

numbered 5 on said Walnut Street, owned by me, or in which I have any right, title or interest. Being the same goods, furniture and chattels used by me in carrying on the business of a boarding-house keeper at said No. 5 Walnut Street, in said Boston."

On April 23, 1897, the two defendants joined in a mortgage of all the household effects and personal property in the house No. 5 Walnut Street for \$1,500, and the mortgage was recorded.

The plaintiffs contended that the occupation of the house by the defendants and their use of it as a boarding-house was a joint enterprise to defraud the lessors, and that the defendants were jointly and severally liable for the use and occupation of the premises.

Several rulings based on the foregoing proposition were requested by the plaintiffs and refused by the judge.

The judge found for the plaintiffs against the defendant Whittle in the sum of \$1,700, being one year's rent, less \$50 received by them from others for the occupation of some of the rooms during part of the time, and the interest since September 1, 1898, \$166.65, total, \$1,816.65; but found for the defendant Hoyt, finding that "what she did in or about the house was only to assist her grandmother, that she did not ever agree to pay rent, and was not a party in or to any plan or enterprise to defraud the plaintiffs."

To the refusals and rulings of the judge in regard to the liability of the defendant Hoyt the plaintiffs alleged exceptions.

T. K. Lothrop, Jr., for the plaintiffs.

G. F. Manson, for the defendants, submitted the case on a brief.

KNOWLTON, J. The defendant Whittle occupied the plaintiffs' house under a lease for five years, which expired on September 1, 1897. This lease was extended for one year by an instrument under seal signed by the lessors and lessee, which was virtually a new lease for that term. This action is to recover for the use and occupation of the premises during this year. The judge who tried the case without a jury found against the defendant Whittle. The defendant Hoyt, who was her granddaughter, was a teacher in a kindergarten, and lived in the house without paying rent or board. In July, 1896, the grandmother gave

her a bill of sale of the household goods, furniture and chattels in the house. The plaintiffs contended that the occupation of the house by the defendants and their use of it as a boarding-house was a joint enterprise to defraud the lessors, and that the defendants were jointly and severally liable for the use and occupation of the premises. The judge found in favor of the defendant Hoyt, and found further that "what she did in or about the house was only to assist her grandmother, that she did not ever agree to pay rent, and was not a party in or to any plan or enterprise to defraud the plaintiffs." These findings make the plaintiffs' requests for rulings immaterial to the question whether the defendant Hoyt was liable for use and occupation, and it is unnecessary to consider them in detail.

Exceptions overruled.

D. BLAKELY HOAR, assignee, vs. ALBERT C. TILDEN.

Suffolk. January 11, 1901. — March 1, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

In this Commonwealth execution can be levied on real and personal property contemporaneously. Whether the levies properly can be made by different officers, *quære*.

A deputy sheriff seized on execution chattels of a debtor. The next day the debtor made a voluntary assignment for the benefit of creditors. A month later a judge of the Court of Insolvency appointed an assignee in insolvency of the debtor and executed an assignment to him of all the debtor's property; whereupon the assignee under the voluntary assignment surrendered to the assignee in insolvency all the property of the debtor which had come to his hands and all his rights under the first assignment. Between the times of the two assignments the deputy sheriff by agreement with the debtor permitted certain of the chattels he had seized on execution to be delivered to customers of the debtor and paid for on delivery, and then seized on execution the money paid by the customers. In an action by the assignee in insolvency against the deputy sheriff for conversion, it was *held*, that the levy on the money was good against the plaintiff, although the defendant's permitting the chattels to be turned into money might have defeated the original seizure of the chattels as against the assignee under the voluntary assignment, since the plaintiff's title rested on the assignment from the judge of the Court of Insolvency and did not date from the previous voluntary assignment which had been superseded and abandoned.

An attorney at law to whom one of his clients had made a general assignment for the benefit of creditors on March 30th was asked as a witness whether the as-

signor had not stated to him during the latter part of March that he did not own certain real estate levied upon. This was objected to as calling for a privileged communication between attorney and client. *Held*, that it did not appear that the parties were acting at the time in the relation of attorney and client, as this statement might have been made on March 31st to give information to the assignee in regard to the property covered by the assignment.

An exception will not be sustained to the admission of evidence which could not have applied to any question submitted to the jury and therefore could not have harmed the excepting party.

TORT by an assignee in insolvency against a deputy sheriff for the alleged conversion of certain chattels and money seized on execution by the defendant. Writ dated May 15, 1897.

At the trial in the Superior Court, before *Blodgett, J.*, the following facts appeared in evidence: In September, 1896, one Auffmordt and others brought an action of contract against one Mary E. Moore, and attached all her right, title and interest in any real estate in the county of Suffolk, and on the first Monday of March, 1897, recovered judgment in the action. On March 18, 1897, said Auffmordt and others, having obtained an execution in common form upon the judgment, placed it in the hands of Fred H. Seavey, a deputy sheriff, and directed him to levy it, in pursuance of the attachment, upon whatever right, title and interest Mary E. Moore had in a certain parcel of real estate. Seavey levied upon such right, title and interest, as she had, if any, and did all things necessary to perfect the levy. The time fixed for sale thereunder was May 1, 1897. On that day, at the request of the execution creditors, Seavey adjourned the sale, and thereafter again adjourned it by successive adjournments to the times and in the manner permitted by law, until November, 1897, when, by the creditors' direction, he discharged the levy and returned the execution to court in no part satisfied by him.

On March 29, 1897, the defendant, another deputy sheriff, by direction of the judgment creditors, given that day, and by virtue only of the same execution, seized the chattels in question, which were then subject to a prior attachment under a writ in his hands, subject to said attachment. The defendant then knew of the existing levy on real estate above mentioned.

On March 30, 1897, Mary E. Moore made a general assign-

ment of all her property, and particularly of the chattels seized on execution, for the benefit of such of her creditors as should assent thereto, to George D. Ayers, an attorney at law who was and had been for a long time her legal adviser, and to whom she was then indebted. This assignment contained a provision that the dividends thereunder should be paid pro rata to such creditors as assented thereto in satisfaction of their claims against the debtor, and that, in the event that the assignor was declared an insolvent debtor within four months, the assignee should give over the property assigned and its proceeds to her assignee in insolvency. Ayers executed this assignment by signing his name thereto and affixing his seal, undertook the trusts thereby imposed, and notified the defendant that he claimed the chattels subject to the levy.

Thereafter the defendant, by agreement with Mary E. Moore previously made, permitted certain of the chattels seized by him to be taken from him to be delivered to customers to be paid for on delivery, and thereafter on April 15, 1897, he according to this agreement seized on the execution \$222 paid by the customers. The prior attachment above mentioned was discharged April 7, 1897.

On April 16, 1897, Mary E. Moore was declared to be an insolvent debtor by the Court of Insolvency of the County of Suffolk. On April 17, 1897, Moore notified the defendant that she claimed that the levy on her personal property was void. Thereafter, on April 29, 1897, the defendant sold the chattels seized by him other than those which had been delivered to customers, at public auction, for the sum of \$1,235, pursuant to the levy.

On April 30, 1897, the plaintiff was appointed the assignee in insolvency of Mary E. Moore, and the judge of the Court of Insolvency executed to the plaintiff an assignment in due form of all the estate, real and personal, of Moore, except such as was by law exempt from attachment. Thereafter, Ayers surrendered to the plaintiff all the property of Moore which had come to his hands, and all his rights under said first assignment. Mary E. Moore subsequently died. This action was brought by the plaintiff to recover the value of the chattels sold at auction, and the \$222.

At the trial, the defendant asked Ayers whether Moore had stated to him during the latter part of March, 1897, that she did not own the real estate levied upon. The plaintiff objected to this question on the ground that it called for a communication privileged because made by a client to her attorney. The judge ruled that the plaintiff could not set up this privilege, and ordered the question answered, and the plaintiff excepted. Ayers answered that Moore had so stated.

The plaintiff asked the judge to make the following rulings: 1. The plaintiff can recover \$222. 2. The plaintiff can also recover the fair value of the goods sold at auction by the defendant.

The judge refused to give either ruling, and by his direction a verdict was entered for the defendant; and the plaintiff alleged exceptions, which, *Blodgett, J.*, having resigned, were allowed by *Braley, J.*

E. F. McClennen, for the plaintiff.

C. H. Sprague, for the defendant.

KNOWLTON, J. The plaintiff rests his principal claim upon a contention that an officer, levying an execution on property of the debtor, cannot levy on real estate and personal chattels, and proceed to enforce the execution against both kinds of property at the same time. The English practice, under which a creditor in collecting a judgment must procure separate writs adapted to the enforcement of the judgment in different ways,—a *capias ad faciendum* if he would proceed against the body of the debtor, a *feri facias* if he would levy upon chattels, and an *elegit* if he would take lands,—does not prevail in this Commonwealth. We have, instead, one form of execution in ordinary personal actions, which is framed in the alternative and leaves to the officer or to the creditor under whose direction he acts, a choice of methods for the service of it. This writ of execution commands the officer to levy upon the goods, chattels, lands and tenements of the debtor, and for want thereof, upon his body. The creditor cannot proceed under the execution against the property and against the body of the debtor at the same time. *Kennedy v. Duncklee*, 1 Gray, 65. *Dooley v. Cotton*, 3 Gray, 496. By the common law, the commitment of a judgment debtor in execution was a satisfaction of the judgment. But by our law

it is otherwise. *Twining v. Foot*, 5 Cush. 512. Pub. Sts. c. 162, § 47. The alternative rights of the creditor are two, one against the body, and one against the lands and chattels of the debtor. In *Dodge v. Doane*, 3 Cush. 460, 463, Mr. Justice Metcalf, speaking for the court, says, "It has never been doubted, but that a levy on land may be made for a balance left unsatisfied after a levy on goods and chattels, and *vice versa*, without taking out an *alias* execution. Such, for a long time, has been the practice." In like manner it has also been the practice to levy upon chattels and lands at the same time, and to proceed *pari passu* with the levies upon the different kinds of property until the execution is satisfied, or the property is all applied to the satisfaction of the judgment. There is no good reason for limiting a levy to one class of property until that is all absorbed, before taking property of the other class. Of course there can be but one satisfaction of the execution. We are of opinion, therefore, that the proceedings of the defendant in this particular were well warranted in law.

No question is raised growing out of the fact that the levy upon lands was by another officer than the defendant, and we do not see that the rights of the parties in the present case are affected by that fact. Complications might arise from an attempt of two officers to proceed under the same execution at the same time, which would be serious.

The other important question in the case relates to the levy upon money which was received by the defendant through an arrangement with the debtor as to the proceeds of property sold while held under the levy. As against Ayers, the assignee under the voluntary assignment, this exchange of goods for money through a delivery to customers who paid cash for them, might have been held to defeat the levy, because the officer allowed the goods to be turned into money in a manner not authorized by law, and because the consent of the debtor could not affect the rights of the assignee; but as against the plaintiff, holding as an assignee in insolvency under proceedings commenced subsequently to the levy on money, the money was lawfully levied on and appropriated. There is nothing to show that the defendant's title under the levy was founded in any part on an unlawful preference. By virtue of the levy he all the time had

a title which could not be affected by subsequent proceedings in insolvency.

The contention of the plaintiff on this part of the case is that he has all the rights which Ayers might have had if proceedings in insolvency had not intervened ; but on the statement contained in the bill of exceptions we understand that the plaintiff's title rests on the assignment from the judge of insolvency, and that the previous voluntary assignment was superseded and abandoned on the appointment of an assignee in insolvency, and that it was not used as an instrument under which the assignee in insolvency was to take a title to property which would not pass by the appointment of the judge. The voluntary assignment might be treated as voidable as a preference on the commencement of insolvency proceedings within four months. *Steel Edge Stamping & Retinning Co. v. Manchester Savings Bank*, 168 Mass. 252. *White v. Hill*, 148 Mass. 396. *Morgan v. Abbott*, 148 Mass. 507. Apparently on this account the provision was inserted in the instrument, that in case of such proceedings, "the assignee should give over the property assigned and its proceeds to her assignee in insolvency." The bill of exceptions states that, after the assignment from the judge, "Ayers surrendered to the plaintiff all the property of said Moore which had come to said Ayers, and all his rights under said first assignment." The language of the first assignment and the subsequent action of the first assignee, as stated in the bill of exceptions, imply an abandonment of the first assignment, rather than attempt to use it to create in the assignee in insolvency a title to property which he could not obtain by virtue of his appointment. As against the excepting party, we feel bound to give the exceptions this interpretation. It follows that the money was legally levied on by the defendant.

The exceptions to the admission of the testimony of what the debtor told Ayers during the latter part of March, 1897, may be overruled on different grounds. In the first place it does not appear that the parties were then acting in the relation of attorney and client. Ayers had taken an assignment of all the debtor's property on March 30, 1897, and this statement may have been made the next day, in reply to an inquiry as assignee to ascertain what property he held under the assignment. Sec-

only, no question was submitted to the jury to which the evidence could have been applied, and under the law, as rightly ruled by the judge, the whole subject was immaterial, and the plaintiff could not have been harmed by the testimony.

Exceptions overruled.

**GEORGE M. ANGIER vs. BAY STATE DISTILLING COMPANY
& another.**

IN RE EUGENE E. BURNHAM & another.

Middlesex. January 14, 1901. — March 1, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Asbestos and magnesia covering placed around steam piping in a distillery, intended as a permanent covering for the metal, may be found to be furnished in the erection of a building within the meaning of Pub. Sts. c. 191, § 1, in regard to mechanics' liens.

A petitioner under Pub. Sts. c. 191, in regard to mechanics' liens, does not waive his lien by bringing an action at law for his debt and attaching the real estate against which he is seeking to enforce his lien.

Pub. Sts. c. 191, § 9, requires a suit to enforce a mechanic's lien to be begun within ninety days after the petitioner has ceased to labor on or furnish labor or materials for the building. A. filed within the required ninety days a petition to enforce a lien. B. did the same. A. after the expiration of the ninety days filed an intervening petition in the suit of B. Later B. discontinued his petition. *Held*, that A. had not lost his lien by failing to file his intervening petition within ninety days from the time he had ceased to labor, and could enforce his lien under his intervening petition in the suit begun by B.

When a round price is to be paid for labor and materials, for a part of which the law gives a lien and for another part of which there can be no lien, and there is no way of determining how much is of one kind and how much of the other, no lien can be enforced.

In a suit to enforce a mechanic's lien for labor and materials furnished for a building standing on two lots, the petition described only the front lot and the portion of the building standing thereon. The back lot did not belong to the respondent who made the contract under which the lien was claimed. The contract provided for the payment of a gross sum for certain labor and materials to be furnished for the whole building without distinguishing between the part of the building described in the petition and the part on the back lot. Certain other labor and materials were to be paid for by the piece, but there was no way of determining what proportion of the piece work was done on one part of the building and what on the other. *Held*, that on these facts no lien could be established. *Batchelder v. Hutchinson*, 161 Mass. 462, distinguished.

PETITION under Pub. Sts. c. 191, to enforce a mechanic's lien for labor and materials furnished in the construction of an electric light plant in a distillery in Cambridge, under an agreement made between the petitioner, Angier, and the respondent, the Bay State Distilling Company, a corporation organized under the laws of New Jersey. The petition of Angier was filed April 29, 1895.

Subsequently two intervening petitions were filed, one by Charles E. Nutter and Alfred H. Seabury, copartners under the firm name of Nutter and Seabury, to enforce a lien for labor and materials furnished in the construction of a system of steam piping in the distillery under an agreement made between Nutter and Seabury and the Bay State Distilling Company; the other by Eugene E. Burnham and Frank G. Page, copartners under the firm name of Burnham and Page, to enforce a lien for labor and materials furnished in covering certain steam pipes, drums, etc., in the distillery with asbestos covering under an agreement made between Burnham and Page and the Bay State Distilling Company. Before the trial in the Superior Court, the petitions of Angier and of Nutter and Seabury were dismissed, and the exceptions related only to the proceedings instituted by Burnham and Page.

At the trial in the Superior Court, before *Sheldon*, J., the report of an auditor was put in evidence. The following statements and extracts are taken from that report:

The buildings constituting the distillery were on the north-erly side of Cambridge Street in Cambridge. The land on which they were situated consisted of two lots, the front lot abutting on Cambridge Street and the back lot lying to the north of the front lot and adjoining it. The buildings stood partly on the front lot and partly on the back lot. The line dividing the lots passed through the buildings. There was nothing on the land or in or upon the buildings to indicate where this line ran. A full description of the front lot was contained in the petitions. In each petition a lien was claimed only on the front lot and the buildings and structures thereon, though in each case a portion of the labor and materials were performed and furnished in the buildings situated on the back lot.

The report then stated the record title to the lots, showing

that at the times when the contracts were made and the labor and materials performed and furnished, the front lot belonged to the Bay State Distilling Company and the back lot to one Richard C. Sibley, both lots having been subsequently conveyed to the Great White Spirit Company.

In the matter of the petition of Burnham and Page the auditor found the following facts :

"On November 27, 1894, the petitioners and the respondent, The Bay State Distilling Company, through its agent, one Breden, having authority, made a written agreement, by which the petitioners agreed to furnish certain asbestos and magnesia covering for the system of steam piping in the respondent's distillery and the respondent agreed to pay therefor."

The offer of Burnham and Page, which was accepted by the Bay State Distilling Company and became the contract, was as follows :

"As requested by your Mr. Breden, we take great pleasure in quoting you the following prices for steam-pipe and boiler covering as per specifications rendered our salesman :

"We agree to do all such work up to ten-inch with our asbestos and magnesia sectional covering for three hundred and sixty dollars, (\$360.00). On all other work we will allow you 10 % from the enclosed list. On all cement work we will charge you twenty cents per square foot."

The specifications signed by Breden as architect and engineer of the Bay State Distilling Company contained the following :

"Covering for two drums over boilers, 2 nozzles, 2 angle valves, 12 drum ends in front and back of boilers. The drums and 12-inch pipe covered with plastic, the remainder of piping with sectional covering.

"The main line of pipe in at this date from boilers out through buildings, ending at first two large wooden tanks in fermenting room, direct steam pipe from boilers to 4 pumps in engine room, and to engine now up and in use, and to three pumps in kettle room, and 2 copper stills in kettle room, also direct steam pipes from old boilers to engine, and pumps in kettle room, as follows :

[Details of valves, tees and ells.]

"Also price per linear foot for each size of pipe mentioned with price for valves, tees and ells furnish a sample of your covering with your bid."

The auditor's report continued as follows: "Shortly thereafter the petitioners began the work called for by said agreement which they completed on February 16, 1895, on which date they ceased to furnish labor and materials. I find that the petitioners fully performed that part of their work described in the specifications, for which they were to receive the lump sum of \$360, and that the respondent became indebted to them in that sum. I find further that other labor and materials not included in said specifications were furnished by the petitioners under the direction of said Breden, and that under the provisions in the agreement relating to such additional work and fixing the price thereof the respondent became indebted to the petitioners for said other work and materials in the sum of \$335.10.

"I find that part of the labor and materials furnished by the petitioners were furnished on said front lot, on which this lien is claimed, and part on said back lot, and that of the labor and materials furnished on the front lot part were furnished under the provision in the contract calling for the payment of a lump sum of \$360, and were those described in the written specifications, and part were furnished under the provisions in the agreement relating to the price to be paid for 'other work' and 'cement work.' The same is true as to the labor and materials furnished on the back lot. The testimony did not show either as to the front or back lot what parts were furnished under each of the different provisions of the agreement.

"I find that of the total amount of labor and materials furnished by the petitioners nine tenths were furnished on the front lot and one tenth on the back lot.

"The steam pipe covering put in by the petitioners was of two kinds, called in the trade 'sectional' and 'plastic.' The sectional covering was made by the petitioners at their factory and brought from there, or from their storehouse, in crates, to the distillery, where it was applied to the pipes by the petitioners' men. It came in three-foot sections or lengths, of different diameters for the pipes, and in shapes made to fit valves, elbows

and tees of different sizes. They were not made specially for this contract but were kept in stock in sizes up to and including a diameter of ten inches. The inside of the covering is composed of asbestos, magnesia and calcite, forming a compact mass something like plaster but not as hard. Outside of this and around it paper felt is pasted, and outside the paper is pasted a covering of canvas. The whole covering is about one and an eighth to one and a quarter inches in thickness. The sections came to the distillery split in two parts held together by the canvas cover. They were placed around the pipes and fastened thereto by brass lacquered bands which were passed through rings and clasped back. Then the canvas, which lapped over like the flap of an envelope, was pasted down. The covering was made to 'hug the pipes' rather tightly. The covering of the elbows and tees was put on in the same way as that of the pipes.

"If material, I find that the sectional covering, after being applied, can be removed by unclasping the bands and pulling up the edges where they are pasted down, but that the discoloration caused by contact with pipes, paste, handling, etc., and the cutting of the sections, when applied, to make them fit the elbows and tees, would very seriously impair, if not wholly destroy, the commercial value of the covering after removal.

"The plastic covering, which was used for pipes and other work exceeding ten inches in diameter, was brought to the distillery in bags and there mixed and applied with trowels in the same manner as plaster. It can be removed by knocking it off with a hammer or similar tool.

"Of the covering furnished according to specifications and for a fixed price approximately one half was plastic and one half sectional. Of the other covering furnished, that stated in items 12 and 13 of the petitioners' account, having a value of \$55.80 according to the price named in the agreement, was plastic and the remainder sectional.

[The petitioners as above stated ceased to furnish labor or materials on February 16, 1895.]

"The certificate of lien was duly filed by these petitioners in the Registry of Deeds for the County of Middlesex on February 28, 1895. On May 14, 1895, they filed a petition to enforce their lien in the Third District Court of Eastern Middlesex. On

July 3, 1895, after service on them of notice of the petition of Angier, they filed this intervening petition to enforce their lien. By writ dated February 23, 1895, returnable into the Superior Court at Salem in the County of Essex, on the first Monday of April, 1895, these petitioners brought an action of contract against the respondent, the Great White Spirit Company, to recover the value of the labor and materials for which a lien is claimed in this petition and attached all the real estate of said Great White Spirit Company in the southern district of said County of Middlesex. The *ad damnum* of this writ was fifteen hundred dollars. By the return of the officer on said writ it appears that the attachment was made February 23, 1895, and that within three days thereafter the officer deposited a certified copy of the writ with so much of his return indorsed thereon as related to said attachment in the Registry of Deeds for the Southern District of said County. Said action is now pending.

"The answer to this petition is a general denial. The defences raised are: 1. That the labor and materials for which the lien is claimed were not furnished and used in the 'erection, alteration or repair of a building or structure situated upon real estate' within the meaning of the statute. 2. That the attachment made as aforesaid in the action at law brought against the respondent, the Great White Spirit Company, operated as a waiver of the lien. 3. That part of the labor and materials having been furnished for a fixed price, on two lots of land, only one of which was owned by the respondent, the Bay State Distilling Company, with whom the contract was made, there can be no lien for that part so furnished on said respondent's lot, because the contract cannot be divided; and that there can be no lien for the labor and materials furnished according to the contract and price list at so much per foot or piece because it is not shown what part of said labor and materials were furnished on said respondent's lot, on which the lien is claimed. 4. That although the petitioners may have filed a petition to enforce their lien in said Third District Court within ninety days after they ceased to furnish labor and materials, they cannot enforce their lien on this intervening petition because it was not filed within said ninety days.

"Subject to the revision of the court I find in favor of the

petitioners on each of the above points. I therefore find that these petitioners are entitled to a lien on the land and buildings described in their petition, the front lot, for that part of the whole amount of labor and materials furnished by them which were furnished and actually used on said front lot, namely for six hundred twenty-five dollars and fifty-nine cents, with interest from May 14, 1895, when their petition was filed."

The following additional facts were agreed at the trial: That items 12 and 13 of the petitioners' account annexed, amounting to \$55.80, being "plastic work" so called, were all furnished upon the front lot; and that the title of the said front lot remained in the Great White Spirit Company continuously from the time of the conveyance to that company stated in the auditor's report down to the time of the trial, except that the land was included in a mortgage made by that company.

The respondents asked for the following rulings: 1. That on all the evidence the petition could not be maintained. 2. That the "sectional covering" so called was not furnished or used in the erection, alteration or repair of a building or structure within the meaning of Pub. Sts. c. 191, § 1. 3. That if before beginning these proceedings the petitioners caused the real estate upon which this lien was sought to be established, to be attached in an action at law brought to recover for the same labor and materials, which action remained pending down to the time of the trial, their lien was thereby waived and this petition could not be maintained. 4. That if the petitioner furnished labor or materials partly on the lot described in the petition and partly on the back lot not described therein under a single contract for a lump sum on one building situated partly on the one lot and partly on the other, a lien cannot be enforced on the lot described in the petition alone, either for the whole or a part of the contract price. 5. That the petitioners' lien cannot be enforced in these proceedings, this intervening petition not having been filed within ninety days of the time when the petitioners ceased to labor.

The judge refused to make any of these rulings and established the lien of the intervening petitioners for the sum of \$804.40.

To this order and to the refusal of each of their requests for rulings the respondents alleged exceptions.

E. F. McClennen, for the respondents.

H. R. Bailey, for the intervening petitioners.

KNOWLTON, J. 1. The judge was well warranted in finding that the labor and materials furnished by the intervening petitioners, Burnham and Page, were furnished in the erection of a building, within the meaning of the Pub. Sts. c. 191, § 1. The still and pipes on which the covering was placed were a part of the building, and the material which the petitioners put on was intended as a permanent covering for the metal. Although it was possible to remove it, the removal would greatly injure it, and it was procured to be retained as long as the pipes remained.

2. The petitioners did not waive their lien by bringing an action at law and attaching the real estate. There was no such change in the situation as when a mortgagee of personal property attaches it, and directs the officer to take possession of it and to hold it as security for a judgment to be recovered on the mortgage debt. See *Evans v. Warren*, 122 Mass. 303. Nor was the attachment like a levy by a mortgagee upon the real estate conveyed by a mortgage, under a judgment and execution obtained in a suit on the mortgage debt. See *Atkins v. Sawyer*, 1 Pick. 351. The effect of such a levy would be to obtain an absolute title to the mortgaged real estate, without allowing the time for redemption secured to the mortgagor by the statute. Pub. Sts. c. 191, § 46, expressly saves to one having a lien of this kind a right to maintain an action at common law for his debt.

3. The judge rightly ruled that the petitioners had not lost their lien by the failure to file the intervening petition within ninety days of the time when they ceased to labor. They seasonably filed their certificate claiming a lien, and then in due time they filed a petition to enforce their lien. Afterwards George M. Angier having filed a petition to enforce a lien for himself, in which he set forth the proceedings previously taken by these petitioners, the petitioners, under the Pub. Sts. c. 191, §§ 16, 19, filed this intervening petition in the suit commenced by Angier, and thereupon their rights to be heard in this case were properly secured, and the subsequent discontinuance of Angier's petition did not affect their claim. The case is not like *Davis v. Arthur*, 170 Mass. 449, in which the petitioner

took no measures to enforce his lien until after the expiration of ninety days from the time when he ceased to furnish labor.

4. In one particular there was error at the trial. A large part of the labor and materials were purchased under an entire contract for a round sum, which included that put on that part of the building which stands on the land described in the petition, and that which was put on another part of the building that stands on the land of another person. Other labor and materials which, in like manner, were put in part on one portion of the building and in part on the other, were to be paid for by the piece, but there was no means of determining what proportion of this was on the one portion of the building and what on the other. It is settled that when a round price is to be paid for labor and materials, for a part of which the law gives a lien, and for another part of which there can be no lien, and there is no way of determining how much is of one kind and how much of the other, no lien can be enforced for either. *Jones v. Keen*, 115 Mass. 170. *Foster v. Cox*, 123 Mass. 45. *Mulrey v. Barrow*, 11 Allen, 152. *McGuinness v. Boyle*, 123 Mass. 570. *Childs v. Anderson*, 128 Mass. 108. *Morrison v. Minot*, 5 Allen, 403. *Felton v. Minot*, 7 Allen, 412. *Clark v. Kingsley*, 8 Allen, 543. *Graves v. Bemis*, 8 Allen, 573. *Driscoll v. Hill*, 11 Allen, 154. This rule applies to the present case. The case of *Batchelder v. Hutchinson*, 161 Mass. 462, cited by the petitioners, is not inconsistent with this rule. In that case there was no agreed price, but the claim was on a *quantum meruit* for labor. A small portion of the building extended beyond the land of the respondents, on land of an adjacent owner. The petitioners were entitled to a lien for so much labor as was done on that part of the building which stood on the respondents' land. The judge found as a fact that a certain amount in value of the labor was upon that part of the building which stood on the respondents' land. There was no occasion for an apportionment, or a determination of proportions, under an entire contract for a round sum, but simply the question how much of the labor charged in the items by the defendant was performed on the respondents' premises. The presiding judge, having made a finding on this question, this court followed the finding, it not appearing clearly that there was no evidence on which the finding could be made. In the

present case it is manifest from the facts stated that there was no way of making an apportionment between different parts of the building under the entire contract. It also seems that there was no way of showing what part of the work to be paid for by the piece was done on one portion of the building and what part on the other.

The doctrine stated in *McCue v. Whitwell*, 156 Mass. 205, and in *Moore v. Erickson*, 158 Mass. 71, 73, has no application to the present case. The principle there stated was, that when, by reason of the failure fully to perform his contract, a builder cannot recover the contract price for erecting a structure on real estate, but may recover on a *quantum meruit* for labor and materials at the rate to be paid under the contract, he may enforce the lien for the amount to which he is entitled, if he could have enforced a lien for the contract price had the contract been fully performed. It follows that the finding must be set aside.

It is agreed that two of the items of work to be paid for by the piece represent labor and materials on the respondents' premises. For these items, amounting to \$55.80 and interest, the lien should be established.

Exceptions sustained.

HEBER B. EMERY & another vs. BOSTON TERMINAL
COMPANY.

Suffolk. January 15, 1901. — March 1, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

In a suit by a lessee for damages from the taking of the leased premises by right of eminent domain, the petitioner attempted to set up an oral extension of his lease. *Held*, that the respondent could take advantage of Pub. Sts. c. 120, § 3, without pleading it, it being incumbent on the petitioner to prove a good title, and if the petitioner's claim for damages depended wholly on the oral lease, the petition if it stated the facts would be demurrable.

It would seem, that under Pub. Sts. c. 120, § 3, an oral lease cannot be made good even between the parties by a subsequent memorandum written after the lessor has parted with his title, but, however that may be, such a memorandum can have no effect as against a stranger who acquired an independent title to the land before the memorandum was made.

Seemle, that a tax title is a new title and not merely the sum of all old titles. Per HOLMES, C. J.

The fact, that a lessor had been in the habit of renewing a tenant's lease whenever it expired and that both landlord and tenant intended to continue their relations on the same terms indefinitely, gives the tenant no property in the nature of an English customary tenant right. Even if such intention added to the saleable value of his lease, the addition would represent a speculation on a chance and not a legal right, and expert testimony as to an increase in value from that source is incompetent. *Baltimore v. Rice*, 78 Md. 307, cannot be followed under our statutes.

St. 1896, c. 516, providing for taking land for a south terminal station in Boston, by § 24 gave the owner of land taken thereunder three months after the filing of a location to vacate his premises. *Held*, that the tenant of such an owner, whose lease expired twenty-five days after the three months allowed for removal, could not recover damages for interruption of his business by reason of having to move, or for the expenses of removing his property to a new place of business; and for loss of tenant fixtures he could recover at any rate no more than the damage caused by his having to leave on the earlier day instead of at the expiration of his lease.

PETITION by the lessees of Hobbs Wharf in Boston for the assessment of damages alleged to have been suffered from the taking of that wharf by the respondent under St. 1896, c. 516, filed May 5, 1897.

At the trial in the Superior Court, before *Blodgett*, J., it appeared, that the petition was brought by the lessees alone, William W. Manning and S. Welles Holmes, trustees, the lessors and owners of the wharf having made a settlement with the respondent. The respondent expressly waived all objections to the non-joinder of the owners in the suit, and by the agreement and at the request of all parties the case was tried as if the only persons interested in the taking were the petitioners. It was admitted that the fee of Hobbs Wharf was taken by the respondent on January 5, 1897, under St. 1896, c. 516, by a location filed on that day in the Suffolk Registry of Deeds.

From May 1, 1862, the present and former members of the firm of W. H. and S. L. Emery had been tenants and lessees of the premises taken by the respondent. Their leases usually ran for two or three years, and from time to time as the leases terminated they were renewed or extended or a similar new lease was given, so that during the whole period of their occupancy they held the premises on substantially the same terms. The testimony further tended to show that, irrespective of any covenant to renew, it was the intention of both the landlord and

tenants to continue their relations on the same terms indefinitely. On the expiration of the then existing lease on April 20, 1894, the owners of Hobbs Wharf gave the petitioners a new lease of the premises for one year from May 1, 1894, with the right to extend and renew the same for one additional year. The original lease and the indorsements thereon were put in evidence. On February 1, 1895, the lease of April 20, 1894, was renewed and extended for two years from May 1, 1895, by a writing indorsed on the lease. Before the last term expired there were some negotiations between the parties contemplating an extension or renewal of the lease, and some time during the week prior to Christmas, 1896, one of the petitioners called upon Holmes, mentioned above, the managing trustee of Hobbs Wharf, in regard to extending their lease from May 1, 1897. He was asked by the attorney for the petitioners to state the conversation that then took place in regard to the extending of this lease from May 1, 1897, the petitioners claiming that the evidence would show that in this conversation their lease of Hobbs Wharf was renewed and extended upon the then existing terms for one year from May 1, 1897, to May 1, 1898. Upon objection of the respondent the judge excluded the evidence, to which ruling the petitioners excepted.

The following indorsements were upon the lease :

"The Lessees to have privilege of renewing within lease, on same terms, for one year from May 1st, 1895, if notice is given Lessors, on or before 1st February, 1895. William W. Manning and S. W. Holmes, Trustees."

"Boston, February 1, 1895.

"Within lease renewed for two years from May 1st, 1895, on same terms. S. W. Holmes, for Self and Co-Trustee."

Holmes testified that subsequently, to wit, on January 8, 1897, he wrote a letter to the petitioner confirming the previous parol extension of the lease and identified the letter he had so written. The petitioners offered this letter in evidence, and upon objection of the respondent the judge excluded it, the letter having been written after the taking. To this ruling the petitioners excepted. The letter excluded was as follows :

"S. Welles Holmes, Room 5, 45 Broad Street, Boston. Boston, 8th Jan'y, 1897. Messrs. W. H. & S. L. Emery, Boston.

Dear Sirs,— Your favor of 2d inst. duly received. According to the terms of the lease of Hobbs Wharf we have extended said lease for one year from May 1, 1897. Yours very truly, S. Welles Holmes, for Self and Co-Trustee."

Holmes further testified that in the November before the taking he had some negotiations with a representative of the Terminal Company, in which he informed him that the Emery lease which would expire the following May was to be renewed for an additional year to May 1, 1898, and he made an agreement in writing with the Terminal Company to sell them Hobbs Wharf subject to the Emery lease thus extended. This agreement was identified and offered in evidence, but upon the respondent's objection was excluded. To this ruling the petitioners excepted.

The agreement excluded was dated November 25, 1896, and contained the following: "Said premises are to be conveyed on or before the twenty-sixth day of December, 1896, by a good and sufficient trustees' deed of the party of the first part, conveying a good and clear title to the same free from all incumbrances, except a certain lease expiring May 1, 1897, with privilege to the lessee of one additional year from that date; all buildings and fixtures of which tenants have right of removal are excepted from this agreement, and for such deed and conveyance the party of the second part is to pay the sum of four hundred and thirty thousand dollars (\$430,000). If this property is taken by right of eminent domain before the sale is consummated, the price agreed shall be the damages paid." An indorsement showed the time of performance of the agreement to have been extended to January 15, 1897.

Holmes also testified that he and his co-trustee had executed a deed of the property to the Terminal Company dated December 22, 1896, and acknowledged, delivered and recorded January 18, 1897, which deed was offered in evidence and admitted against the respondent's objection.

At various times, for the purpose of carrying on their trade as dealers in wood and coal, the petitioners had erected sheds and fitted up the premises with the fixtures and appliances necessary and proper to enable them to carry on their business, all of which sheds and fixtures they had the right to remove at any time that they themselves left the premises.

One Ellis, a carpenter and contractor, familiar with the Hobbs Wharf property, testified that it was not possible to remove these sheds as they then stood except by tearing them to pieces and rebuilding them, which was not practicable; that there were two hoisting machines consisting each of a large mast and boom with ropes, pulleys, etc., worth about \$1,500 each, on January 5, 1897, and that they were affixed to the wharf, and that it would have cost \$500 each to remove them.

William Emery, one of the petitioners, testified that on January 5, 1897, his firm had been served by the respondent with a notice to move, the notice itself being put in evidence, and that it had taken them about three months to remove in an economical and practical manner the coal which at that time was upon the wharf, and that they were not able to remove the sheds within the time allowed. He also gave figures showing the cost of removing the coal from Hobbs Wharf to a new wharf rented by them, and that they had finally removed from Hobbs Wharf on April 5, 1898, having paid no rent since January 5, 1897.

One Wead, a real estate dealer, called by the petitioners and duly qualified as an expert on real estate and rentals, was asked, "Assuming it to be a fact that it was the custom of the owners of Hobbs Wharf to renew the leases of the firm of W. H. & S. L. Emery from time to time as they expired, irrespective of any covenant to renew, in your opinion would the present leasehold of the petitioners have an enhanced value imparted to it by reason of the expectancy of the renewal of the present lease according to such custom?" This question, on the respondent's objection, the judge excluded, and the petitioners excepted.

Wead was further asked: "Assuming that when there is a custom for the landlord to renew the leases of the tenants from time to time as they come due, even in the absence of covenants of renewal it gives an ulterior interest beyond the subsisting term to the tenant called the 'Tenant Right.' Assuming that such a 'Tenant Right' existed in the present petitioners in relation to Hobbs Wharf, in your opinion would such a 'Tenant Right' enhance the value of the petitioners' property taken by the respondent?" This question, on the respondent's objection, the judge excluded, and the petitioners excepted.

He was further asked: "Assuming it to be a fact that the

petitioners are the tenants of the property described in the proceedings in this case, and that the lease of land had been renewed from time to time for a great number of years, and that the tenants made valuable improvements upon the property, relying upon a renewal of their leases, and that it was the intention of the landlord and the petitioners to renew said lease from time to time, in your opinion would any additional marketable value be imparted to the petitioners' interest by reason of the probability of the renewal of said tenancy?" This question, on the respondent's objection, the judge excluded, and the petitioners excepted.

He was further asked: "What in your opinion is such additional market value worth?" This question, on the respondent's objection, the judge excluded, and the petitioners excepted.

The petitioners requested the judge to instruct the jury as follows: 1. As between the petitioners and the respondent the extension of the lease to May 1, 1898, was valid and binding, to grant a leasehold for that period without being in writing. 2. The defence of the statute of frauds to the extension of the lease to May 1, 1898, is not open to the respondent. 3. The letter of January 8, 1897, from Mr. Holmes, is a sufficient note or memorandum of the extension of the lease from May 1, 1897, to May 1, 1898, to satisfy the statute of frauds. 4. By the oral agreement, and the letter of January 8, 1897, the petitioners held a leasehold estate in the premises taken by the respondent until May 1, 1898. 5. The petitioners had a valid enforceable lease of the premises in question in this suit extending until May 1, 1898. 6. When there is a custom for the landlord to renew the leases of the tenants from time to time as they come due, even in the absence of covenants of renewal it gives an ulterior interest beyond the subsisting term to the tenant which is called the "Tenant Right." If, therefore, the jury find that it was the custom of the owners of Hobbs Wharf to renew the leases of the firm of W. H. and S. L. Emery from time to time, then in estimating the value of the present leasehold, irrespective of covenants of renewal, the jury may make a reasonable allowance to the petitioners for their tenant right or expectancy of renewal. 7. If the jury find from the evidence that the peti-

tioners are the tenants of the property described in the proceedings in this case and that the lease of land had been renewed from time to time for a great number of years, and that the tenants made valuable improvements upon the property relying upon a renewal of their leases, and that it was the intention of the landlord and the petitioners to renew said lease from time to time, then the jury in estimating the damages sustained by the petitioners may take into consideration the additional marketable value, if any, imparted to the petitioners' interest by reason of the probability of the renewal of said tenancy, provided the jury make proper allowance for the precarious nature of such expectancy. 8. The petitioners are entitled to receive as damages from the respondent a sum to compensate them for injury to their business, the loss of the earnings and profits, for the period that the business was temporarily suspended or interrupted by removing from the Federal Street place to another location. 9. The petitioners are entitled to recover in damages the expenses of the removal of their property taken by the respondent to the other place they secured for their business. 10. The petitioners are entitled to recover as damages for the loss of the tenant fixtures which were taken from them, together with damages for any depreciation in those tenant fixtures which they were able to remove with them.

The judge refused to make the rulings requested, and instructed the jury among other instructions, as follows: "I instruct you in this case that in the assessment of damages you will proceed upon the assumption that the petitioner's lease would have ended, had there been no taking whatever, on the 1st day of May, 1897, and you cannot take into consideration any oral agreement, or understanding or usage between the parties as to extending or renewing the lease. . . .

"Certain sheds or buildings were erected upon this wharf, and certain elevators. Now, it is conceded by everybody that those were treated from first to last as tenant's fixtures. It is not entirely certain that they ever became fixtures in any sense; but, assuming for the purpose of the trial, and I do so instruct you, that they were tenant's fixtures, the petitioners had the right to remove those fixtures at any time before the termination of their lease. They had the right to remove them at any time

before the 1st day of May, 1897, if they cared to remove them. If they did not choose to remove them during that time, and had not the consent of the owners to remove them afterwards, they would become the property of the owners of the real estate, and would be treated as real estate. Now, I instruct you that these petitioners had the right to remove those fixtures at any time within three months after the taking. You will observe that the time within which they could remove the fixtures was abridged by twenty-five days; and the petitioners are entitled to recover, in addition to the damage to which I have already called your attention, whatever damage you say upon all the evidence in the case was sustained by reason of the fact that the time within which they might remove the fixtures was lessened by twenty-five days from what it would have been had they held possession until the termination of the lease by its own limitation. . . .

“I said to you, gentlemen, that the petitioners were required to remove those fixtures within three months. If they did not remove them within three months after the taking, they lost all right to remove them; and you are not to give them damages for such as they did not remove, but you may consider what damages the petitioners sustained because they were unable to remove their fixtures, inasmuch as the time within which they would have had the right to remove them was cut down by twenty-five days.”

The jury returned a verdict for the petitioners in the sum of \$248.85; and the petitioners alleged exceptions, which, *Blodgett, J.*, having resigned, were allowed by *Mason, C. J.*, under St. 1894, c. 412.

L. M. Friedman, for the petitioners, upon his contention that the letter of January 8, 1897, was a sufficient “instrument in writing” to make valid the extension of the lease to May 1, 1898, argued as follows:

Pub. Sts. c. 120, § 3, although it now forms part of a chapter entitled “Of the Alienation of Real Estate,” is in fact a provision of the statute of frauds. This section does not make it obligatory that a lease shall only be created by the terms of a written instrument, but merely that the terms of a parol lease shall be evidenced by a writing to be effective. Section 3 of

c. 120 first took its present form in the hands of the commissioners on the statutes in their report of 1834. Report of the Commissioners, c. 59, § 28.

The commissioners took the substance of this provision from "An Act directing the mode of transferring real estates by deed, and for preventing fraud therein." St. 1783, c. 37, § 1.

The first section of the St. of 1783 unites in a single paragraph, almost in its identical language, the provisions of both §§ 1 and 3 of the original statute of frauds. 29 Car. II. c. 3, §§ 1 and 3.

Section 1 of the St. of 1783 and the first part of the present § 3 relate to the creation of leasehold estates, and alone are involved in the present discussion. Section 3 of the St. of 1783 and the latter part of the present § 3, deal only with the transfer of such interests where they already legally exist under § 1. Browne, St. of Frauds, § 41. Sugd. Vend. & Pur. c. 4, § 1.

So far as their notes show the commissioners intended to make no change in the old act but merely to condense its elaborate wording. When, therefore, the present statutes speak of an "interest in land created without an instrument in writing," it means only what the older statute meant by "leases . . . made or created by livery and seisin only, or by parol, and not put in writing," and no more.

We are, therefore, not only justified in considering this § 3 of c. 120 as being part of the statute of frauds, but also in interpreting it in the spirit of that statute, and applying to it the same construction and rules that have been applied to its other sections.

The statute of frauds does not prohibit verbal contracts. On the contrary, it presupposes that the terms of the contract rest in parol proof, and only requires, in addition to the proof of such verbal agreement evidence of an additional fact in order to render the contract enforceable, *e. g.*, the fact that the lease was put in writing. *Marsh v. Hyde*, 3 Gray, 331, 333. *Mayberry v. Johnson*, 3 Green, 116. *Sanders v. Partridge*, 108 Mass. 556.

For many purposes a lease not put in writing is effective. At most it is not void but merely voidable. *Elliott v. Stone*, 1 Gray, 571, 574.

Section 3 does not require that a lease should be by deed. It simply means that in whatever way leases might have been created prior to the statute they may still be created, except that a writing must be given to show that they have been so created in order to give them greater effect than an estate at will. It is not necessary that the writing so required should be made contemporaneously with the agreement. It is sufficient if made at any time thereafter. *Browne, St. of Frauds, § 352 a. Shippey v. Derrison, 5 Esp. 190. Sievewright v. Archibald, 17 Q. B. 103, 107. Williams v. Bacon, 2 Gray, 387. Marsh v. Hyde, 3 Gray, 331. Bird v. Munroe, 66 Maine, 337.*

Nor does the fact that the rights of third persons may be affected by the giving of the writing take away from the person who is required by the statute of frauds to sign such writing the right to give it at any time he may choose. *Gardner v. Rowe, 2 Sim. & Stu. 346, affirmed in 5 Russ. 258. Dixon v. Ewart, Buck, 94. Dawson v. Ellis, 1 Jac. & W. 524. Ambrose v. Ambrose, 1 P. Wms. 321. Bedinger v. Whittamore, 2 J. J. Marsh. 552. McCormac v. Smith, 3 T. B. Mon. 429, 432. Carney v. Reed, 11 Ind. 417. Bird v. Munroe, 66 Maine, 337, 341.*

When, therefore, we read § 3 of c. 120, as providing that a lease not put in writing, as contrasted with a lease afterwards put in writing, shall have the effect of a lease at will only, the sole question that remains is whether the letter of January 8, 1897, was a sufficient putting in writing of the previously made renewal. It was not made contemporaneously with the lease, but we see that is not necessary.

Nor is it material that the location had been filed and the estate taken before the writing was made. When the Terminal Company took the fee of Hobbs Wharf it took from each owner whatever estate he had. On that day, W. H. and S. L. Emery had a leasehold of the property from May 1, 1897, to May 1, 1898, good and enforceable at law whenever they had the evidence of it in writing. The lessors had the right to give the lessee the written evidence of their lease at any time.

Just as in *Gardner v. Rowe*, a bankrupt could give the writing, after his adjudication, the trustee of Hobbs Wharf could give the writing after the filing of the location. Furthermore, the giving of such writing was no injury to the Terminal Com-

pany and it lost no rights thereby, because under the provision of Pub. Sts. c. 49, § 18, it was only obliged to pay the entire value of the land as a whole, irrespective of the existence of a lease or other contract between owners of different interests. *Burt v. Merchants' Ins. Co.* 115 Mass. 1, 15. The fact that it made a settlement with the landlords does not increase the rights of the respondent nor cut down the rights of the petitioners.

P. H. Cooney, for the respondent.

HOLMES, C. J. This is a petition for the assessment of damages caused by the taking of Hobbs Wharf in Boston under the right of eminent domain. The taking was on January 5, 1897. At that time the petitioners were in under a written lease which had been extended to May 1, 1897. The other parties interested have been settled with and there is no question about them. The petitioners offered to show an oral agreement extending their lease for a year more, made before January 5, and a written memorandum of the same made after that date. These were excluded by the court, and the petitioners excepted. The petitioners also excepted to the exclusion of an agreement under seal, made before the taking, between the owners of the wharf and the respondent, by which the owners covenanted to convey the premises on or before a certain date, free of incumbrances except a lease "expiring May 1, 1897, with privilege to the lessee of one additional year from that date," and by which the parties agreed that if the property was taken by right of eminent domain before the conveyance the price fixed should be the damages paid. Other exceptions will be mentioned later.

We think it quite plain, notwithstanding the acute argument for the petitioners, that the exclusion of the foregoing evidence was right. Pub. Sts. c. 120, § 3.

To begin with the question of pleading, it was not necessary for the respondent to plead the statute. It was a stranger to the petitioners' title, and, when the petitioners alleged that they had a good one, had a right to call on them to prove it without undertaking to specify in what respect it might turn out bad. A remote and imperfect analogy may be found in the rule that a stranger need not make profert of a deed. *Shep. Touchst.* 73. Moreover the petition itself sets out the facts, and would have

been demurrable but for the admitted interest of the petitioners up to May 1, 1897. *Ahrend v. Odiorne*, 118 Mass. 261, 268.

In the next place, the operation of the statute is not confined to privies, but the respondent can rely upon it. The natural interpretation of the words of Pub. Sts. c. 120, § 3, is that the writing required for the creation of an interest in land is more than a memorandum of the constituent act, that it is itself the constituent act. It seems to us clear that the writing must have a part at least in the creation of the estate. But if a different construction should be adopted in view of the history of the section and upon a comparison with Pub. Sts. c. 78, § 1, the result would not be changed.

At the date of the taking the petitioners had no more estate beyond May 1, as against the respondent, than they had as against the owners of the wharf. To that extent at least the words of the act are explicit. The statute here is not dealing with promises, in which case it naturally would be directed only to the rights of the parties to a contract, but with estates, which are interests *in rem*, good against all the world. It therefore is dealing with the rights of all the world, and when it says that an estate created without writing shall have the effect of an estate at will only, it affects the reciprocal rights of the tenant and of any one else who may be concerned in the nature of that estate.

The petitioners, having had no estate beyond May 1 at the date of the taking, could not get one by the retroaction of a letter from the former owners, who were strangers to the land at the time when it was written. It seems to be settled in England with regard to sales of chattels under the seventeenth section of the statute of frauds, (Pub. Sts. c. 78, § 5,) that the memorandum does not retroact so as to affect third persons. *Morgan v. Sykes*, stated in *Coats v. Chaplin*, 3 Q. B. 483, 486. *Stockdale v. Dunlop*, 6 M. & W. 224, 233. *Felthouse v. Bindley*, 11 C. B. (N. S.) 869, 877. Benjamin, Sales, (7th Am. ed.) § 40 a, note m. See *Marsh v. Hyde*, 3 Gray, 331, 333; *Bird v. Munroe*, 66 Maine, 337, 343. In *Leadlay v. McRoberts*, 13 Ont. App. 378, 383, where it is said that an act satisfying the statute relates back to the date of the oral contract, the judge is speaking of the effect as between the parties, — a matter which we need

not consider. A similar principle to that which we adopt is familiar in regard to ratification. *Whiting v. Massachusetts Ins. Co.* 129 Mass. 240, 241.

The case of *Gardner v. Rowe*, 2 Sim. & Stu. 346; 5 Russ. 258, relied on by the petitioners, is not inconsistent with our decision. That was the case of a trust declared by a bankrupt after the bankruptcy. Assignees in bankruptcy are successors *per universitatem*, and stand in the shoes of the bankrupt. *Chipman v. Manufacturers' National Bank*, 156 Mass. 147, 149. *Phosphate Sewage Co. v. Molleson*, 5 Ct. of Sess. Cas. (4th Ser.) 1125, 1138. Property held in trust does not pass to them. 5 Russ. 262. *Low v. Welch*, 139 Mass. 33. And as was observed in argument, 2 Sim. & Stu. 348, the statute of frauds did not require trusts to be created by writing but only to be proved by it. So, when the only change since the beginning of the alleged trust is the death of the *cestui que trust*, it may be that the trustee still can make a declaration which will be effectual as to the interests of the heirs and widow. *Ambrose v. Ambrose*, 1 P. Wms. 321. But the cases of *Gardner v. Rowe* and *Ambrose v. Ambrose* are inapplicable to the case of an instrument which is more than a memorandum. They also are inapplicable to a case where the person to be affected comes in not in privity but by a new, adverse and paramount title. Even a disseisor takes free of trusts, at least by the old law. *Chudleigh's case*, 1 Co. 120, 122 a. Lewin, Trusts, (10th ed.) 9, 10, 13. The prevailing opinion seems to be that a tax title is a new title and not merely the sum of all old titles. *Hefner v. Northwestern Ins. Co.* 123 U. S. 747, 751. *Brewer v. District of Columbia*, 5 Mackay, 274, 278. *McQuity v. Doudna*, 101 Iowa, 144, 146. *Textor v. Shipley*, 86 Md. 424, 438. See *Harrison v. Dolan*, 172 Mass. 395, 398. And if there is such a thing as a new title known to the law, one founded upon a taking by the right of eminent domain is as clear an example as can be found. See Williams, Pers. Prop. (15th ed.) 46.

It very properly was not argued that the reference to the tenants' supposed rights in the agreement between the owners and the respondent satisfied Pub. Sts. c. 120, § 3. We need not go into the reasons further than we have done at the beginning of our discussion. *Shippey v. Derrison*, 5 Esp. 190, seems to have

been a suit on a contract to take a lease, and so only to have involved the fourth section of the statute of frauds. Pub. Sts. c. 78, § 1.

It appeared that the owners had been in the habit of renewing the petitioners' lease from time to time, and an attempt was made to give this fact the aspect of an English customary tenant right. The evidence merely showed that the landlords and the tenants were mutually satisfied and were likely to keep on together. It added nothing except by way of corroboration to the testimony that they both intended to keep on. Changeable intentions are not an interest in land, and although no doubt such intentions may have added practically to the value of the petitioners' holding, they could not be taken into account in determining what the respondent should pay. They added nothing to the tenants' legal rights, and legal rights are all that must be paid for. Even if such intentions added to the saleable value of the lease, the addition would represent a speculation on a chance, not a legal right. The court was right in excluding expert evidence as to an increase in value from that source. *The King v. Liverpool & Manchester Railway*, 6 Nev. & Man. 186, 191; *S. C.* 4 Ad. & El. 650. Under our statutes we are not prepared to follow *Baltimore v. Rice*, 73 Md. 307. For as under the statutes the land was to be valued as a whole and then the amount subdivided, (St. 1896, c. 516, § 23; Pub. Sts. c. 112, §§ 95, 100, 107; c. 49, §§ 18, 22, 25,) the view opposite to ours would allow the tenants to diminish the share of the landowners on the strength of the latter having entertained an intention which they were free to change if they chose. See *Phyfe v. Wardell*, 5 Paige Ch. 268, 279. This consideration loses none of its force in determining the principle to be adopted merely because the landlords happened to have made an improvident bargain with the respondent in the particular case,—a matter with which the petitioners had nothing to do.

An exception was taken to the refusal of a ruling that the petitioners were entitled to recover of the respondent a sum to compensate them for injury to their business, the loss of the earnings and profits, for the period that the business was temporarily suspended or interrupted by removing from their old place to another location. The judge was right. It appears from

what we have said that the petitioners had no rights in the land as against the respondent after May 1. At that date they would have had to leave the premises and could have recovered nothing for being forced to do so. *Emerson v. Somerville*, 166 Mass. 115, 118. For this, if for no other reason, they were entitled to recover nothing for interruption of their business by reason of having to move. The same principle applies to a claim for the expenses of removing the petitioners' property to their new place of business.

The last exception argued was to a refusal to rule that the petitioners were entitled to recover "for the loss of the tenant fixtures which were taken from them, together with damages for any depreciation in those . . . which they were able to remove." All that is necessary to add with regard to this is that by the statute the respondent had to allow the petitioners three months for removing after taking the land. St. 1896, c. 516, § 24. That took them to April 5. Any damage caused by having to leave on that date rather than on May 1 the judge allowed the jury to give. That was as favorable an instruction as the petitioners were entitled to ask.

Exceptions overruled.

ATTORNEY GENERAL vs. JOHN W. TREHY.

Suffolk. January 15, 1901. — March 1, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

The almoner of Chicopee is not a judicial officer.

The civil service commissioners have power to require offices involving confidential relations between the incumbent and his superior, which are not by statute exempted from their rules, to be filled under the rules, or so may classify them that they will be free.

The almoner of Chicopee, appointed annually by the overseers of the poor of that city, is not a head of a principal department, and his appointment is subject to the rules made by the civil service commissioners.

Semble, that the overseers of the poor of the city of Chicopee are heads of a principal department and as such exempted from classification under the civil service laws.

INFORMATION in the nature of a *quo warranto* by the Attorney General at the relation of the civil service commissioners

against one John W. Trehy, whom the overseers of the poor of the city of Chicopee appointed almoner without making requisition upon the relators for the names of eligible persons as required by their rules, filed as amended November 23, 1900.

The answer among other matters alleged that the duties of the respondent as city almoner are prescribed and set forth in the Revised Ordinances of 1898 of the city of Chicopee, a copy of which, so far as they relate to such duties, was annexed to the answer; that the duties are more than clerical and are not simply routine, and the proper discharge of the duties involves the exercise of judgment, discretion and responsibility; that the almoner is required to act for and in place of the board of overseers of the poor, with the same authority as that board, and to perform acts and make agreements and decisions which are binding upon and control the city of Chicopee and impose financial obligations upon the said city, and which are of such a nature that the city will be bound thereby and answerable therefor; that the duties of the office are chiefly judicial, and not clerical, and that in the exercise of the duties of his office the almoner is in effect the head of the pauper department, that being one of the principal departments of the city of Chicopee; and he is not affected in his office by any rules made by the civil service commissioners for the selection of persons to fill offices in the government of the Commonwealth, and of the several cities thereof, which are required to be filled by appointment.

The case was heard upon the amended information and answer by *Morton, J.*, who at the request of the parties reported it for the consideration of the full court, such order to be made as law and justice might require.

F. H. Nash, Assistant Attorney General, for the relators.

L. E. Hitchcock, for the respondent.

BARKER, J. This information, in the nature of *quo warranto*, is brought under St. 1899, c. 376, at the relation of the civil service commissioners, to try the respondent's title to the office of city almoner of Chicopee, an office created by the charter of the city. A vacancy existing in the office, the respondent was appointed to fill it from May 1, 1900, by the board of overseers of

the poor of the city, without making a requisition upon the civil service commissioners for the names of eligible persons.

Our statute requires the commissioners to prepare rules "for the selection of persons to fill offices in the government of the Commonwealth and of the several cities thereof, which are to be filled by appointment, and for the selection of persons to be employed as laborers or otherwise in the service of the Commonwealth and of the several cities thereof." St. 1884, c. 320, § 2. Such rules may be made from time to time and may be given a general or a limited application. They must, among other things, provide "For the classification of the offices and employments to be filled," "For open competitive and other examinations by which to test applicants for office, or for employment, as to their practical fitness to discharge the duties of the positions which they desire to fill," and "For the filling of vacancies in offices in accordance with the results of such examinations." St. 1884, c. 320, § 14, cls. 1, 2, 3.

But "Elective or judicial officers and officers whose appointment is subject to confirmation by the executive council, a city council or a school committee, heads of any principal department in a city, officers for the faithful discharge of whose duties a superior officer is required to give bond, teachers of the public schools, the private secretary of the governor or of the mayor of any city shall not be affected, as to their election or selection, by any rules made as aforesaid; but such rules shall apply to members of the police and fire departments other than police and fire commissioners, chief superintendents and marshals of police departments, and chief engineers of fire departments." St. 1884, c. 320, § 15. This section has been twice amended but the amendments do not seem to be material to the present discussion. See St. 1893, c. 95; St. 1896, c. 502.

The classification of offices and employments to be filled, and the rules made by the commissioners with the approval of the governor and council, have the force of laws and are binding upon appointing officers. *Opinion of the Justices*, 145 Mass. 587, 590.

The commissioners by their rules have classified the office of almoner as one to be filled under the provisions of the statute, and have required that whenever there is a vacancy to be filled

in the office the appointing officer or power shall make requisition upon the commissioners for the names of eligible persons. To become such eligible persons applicants must undergo an examination, the subjects of which have been designated by the commissioners, which must be such as the needs of the service require and as tend to prove the qualifications of the applicant for the office sought. The commissioners may also order examinations upon other subjects of a technical or special character, to test the capacity which may be needed in any part of the classified service which requires peculiar information or skill, and these examinations may be either competitive or non-competitive.

The rule making the classification and requiring the requisition when there is a vacancy to be filled, is as follows :

“Schedule A shall include clerks, copyists, recorders, book-keepers, inspectors, agents, almoners, visitors, stenographers, typewriters, messengers, and persons rendering service similar to that of any of the above specified positions in the service of the Commonwealth or of any city thereof, under whatever designation, whether such service is permanent or temporary, and whether the same is paid by time for work done, by the piece, or in any other manner.

“Whenever there is a vacancy to be filled in the classified service, the appointing officer or power shall make requisition upon the commissioners for the names of eligible persons.

“The subjects of examination may be designated from time to time by the commissioners, and shall be such as the needs of the service require, and such as tend to prove the qualifications of the applicant for the office sought.

“The commissioners may also order examinations upon other subjects of a technical or special character, to test the capacity which may be needed in any part of the classified service which requires peculiar information or skill. Examinations hereunder may be competitive or non-competitive. The application for, and notice of, the special examinations, the records thereof, and the certification of those found competent, shall be such as the commissioners may prescribe.”

The charter of Chicopee does not name any board or union of boards its city council. It vests the government of the city

and the administration of all its affairs, except those of the public schools, in an executive department consisting of one officer, the mayor, and in a legislative department consisting of a single body, the board of aldermen. St. 1897, c. 239, § 2. It further provides for certain administrative officers to be appointed by the mayor, and who shall perform the duties prescribed for them by the general laws, and by the charter, and such further duties not inconsistent with the nature of their respective offices as the board of aldermen may from time to time prescribe. Among these administrative officers are "a board of overseers of the poor, to consist of three persons." St. 1897, c. 239, § 38.

Another section provides for the office now in question. "The overseers of the poor shall annually appoint a city physician and an almoner, neither of whom shall be one of their own number, who shall, under the direction of said overseers, severally perform such duties as may be required by ordinance, and such further duties as said overseers may from time to time require. They may be removed from office at any time by the overseers for such cause as said overseers may deem sufficient. Members of the board of overseers of the poor shall serve without compensation." St. 1897, c. 239, § 44.

Further provision of the charter are in substance that the administrative officers and boards shall annually furnish to the mayor "an itemized and detailed estimate of the moneys required for their respective departments or offices during the ensuing financial year." St. 1897, c. 239, § 54. That "Every administrative board, through its chairman, and every officer having charge of a department, shall, at the request of the board of aldermen, appear before it and give such information as it may require in relation to any matter, act or thing connected with the discharge of the duties of such board or officer; and when so requested to appear the officer who appears shall have the right to speak upon all matters under consideration relating to his department." St. 1897, c. 239, § 56. There is also a section providing that nothing in the charter shall affect the enforcement of the civil service laws or of the rules made by the commissioners thereunder, and that the board of aldermen shall make sufficient and proper appropriations for carrying out

and enforcing those laws and rules in the city. St. 1897, c. 239, § 57.

As the rule classifying the office of almoner as one to be filled by requisition upon the civil service commissioners for names of eligible persons had long been in force when the charter of Chicopee was revised by the Act of 1897, the provision of the section last quoted comes near to being a declaration that in the opinion of the Legislature which granted the present charter the office now in question was one which the civil service acts and rules might require to be filled under those rules.

The office of almoner is not one created by any statute of general application, nor are its duties defined by any such statute. The first use of the term as designating a municipal office, which we have found is in the city charter of Northampton, which provides for the election of six persons to be the board of almoners of the city under the provisions of the Whiting Street will, the mayor of the city to be *ex officio* chairman of the board, and its members to serve without compensation. St. 1883, c. 250, § 26. See also St. 1900, c. 427, § 30. In the charter of the city of Marlborough is a provision that the board of overseers of the poor may annually elect an almoner, not one of their own number, who shall serve as clerk of the board, with compensation to be fixed by vote of the city council, and removable by the board. St. 1890, c. 320, § 25. The original charter of Chicopee has a similar provision, and also a provision for the election of three persons to constitute the board of almoners of the city, under the provisions of the Whiting Street will, the members to serve without compensation. St. 1890, c. 189, §§ 26, 29. In the North Adams charter it is provided that the auditor shall also be the city almoner, and he is required to keep a record of settlements of paupers and under the direction of the overseers of the poor to relieve paupers outside of the almshouse, see that paupers chargeable elsewhere are maintained by their own municipalities, that the city is reimbursed for outlays made for paupers having no settlement in the city. He is also to report cases needing legal attention to the city solicitor, furnish him with information, and perform such other duties as the overseers of the poor may direct. St. 1895, c. 148, § 42.

In some city charters provision is made for the appointment of an agent, clerk, or superintendent by the board of overseers of the poor, and in such case the duties of the officer so appointed would no doubt be similar to those incumbent on the respondent. See St. 1884, c. 309, § 22; St. 1890, c. 275; St. 1894, c. 190, amending St. 1875, c. 173, § 29; St. 1895, c. 302, § 24. In other charters more general power is given to employ, discharge and remove all subordinate officers, clerks and assistants. St. 1892, c. 324, § 37; St. 1892, c. 355, § 38. See also St. 1892, c. 377, § 2, art. 38.

In still other charters general power is given to the city council to choose and appoint all subordinate officers for whose election or appointment other provision is not made and to define their duties and fix their compensation. St. 1881, c. 169, § 23. St. 1873, c. 246, § 16. St. 1873, c. 154, § 33. In those charters in which this authority is not specifically given it is no doubt covered by the general grant establishing the city and vesting its government and the administration of its affairs in its legislative and executive departments.

What cities other than Chicopee have almoners whose offices are established by their charters or by ordinance is not material. The respondent has been appointed to and is exercising that office in the city of Chicopee. By the charter the office is one in the government of the city required to be filled by appointment. This authorizes the civil service commissioners to make rules for the selection of persons to fill it, under St. 1884, c. 320, § 2, and to classify it as one to be filled upon requisition to them of the names of persons eligible, unless the office is one, as the respondent contends, the incumbent of which is not affected by the classification and rules of the commissioners.

The respondent is not an elective officer nor is his appointment subject to confirmation. He contends that his duties are of such a nature as to bring him within the class of judicial officers. This contention is unsound. In passing upon questions of settlement and in dealing with paupers and persons claiming relief from the city under the poor laws or bounty or alms under the provisions of the Whiting Street will, as well as in discharging all other duties imposed upon him by the charter and ordinances, he is simply an administrative officer. If

his acts concerning a pauper founded upon his view of the law fix or impose an obligation upon the city, it is not by way of judicial determination, but of administrative action.

He also contends that he is not affected by the commissioners' classification because a confidential relation exists between himself and the board of overseers of the poor. Assuming that such a relation exists it is not one of the things which precludes the office from being classified as one to be filled under the rules. Certain confidential offices are named in the section which defines the offices not to be affected by the classification and rules of the commissioners, and many other such offices are comprehended in the general classes exempted by the section. Aside from these exemptions the statute leaves to the commissioners power in their judgment and discretion to require offices involving confidential relations between the incumbent and his superior to be filled under the rules, or to so classify them that they will be free.

The remaining contention is that the respondent's office cannot be included properly in the classification in which it has been put by the commissioners, because the incumbent is one of the heads of a principal department in the city. All "heads of any principal department in a city" the statute declares "shall not be affected, as to their election or selection, by any rules" made by the commissioners.

Practically separate departments have always existed in city governments, but there are few if any instances before the enactment of the civil service statute of 1884, of the use of the word "department" in city charters, except in the phrase "Fire department," which was not unusual. The meaning of the phrase "principal department in a city" in that statute must, we think, be determined without much help from subsequent charters, in which the word "department" and the phrase "head of a department" have been used quite commonly. See St. 1888, c. 347; St. 1889, c. 411, § 31; St. 1890, c. 189, § 33; c. 320, § 34; St. 1892, c. 324, §§ 30, 31, 33, 39, 44; c. 355, §§ 31, 32, 38, 39, 42; St. 1892, c. 377; St. 1895, c. 148; St. 1899, c. 162, §§ 2, 9, 27, 32, 36, 41, 42, 47; St. 1900, c. 427, §§ 57, 64, 65, 75. The statute under which the respondent's office was created makes quite frequent use of the word "department." St. 1897,

c. 239. We do not however find the exact phrase "heads of any principal department in a city" except in the section of the civil service statute now under consideration.

Looking at the second section of the revised charter of Chicopee it might be said that the only "principal departments" of the government of that city were the executive, consisting of one officer, the mayor, and the legislative, consisting of a single body, the board of aldermen. These are each called departments in the charter, and in a sense they are clearly the principal departments. But the phrase "heads of any principal department in a city," in the civil service statute, plainly was not meant to designate merely the mayor and aldermen. Without attempting to state all that the phrase does and does not include in the way of municipal officers, we are of opinion that those city officials who are charged with the administration of the poor laws constitute a principal department of the city government within the meaning of St. 1884, c. 320, § 15.

The remaining question is whether the respondent is one of the heads of that department. We think not. The chief head of that department is the mayor. St. 1897, c. 239, §§ 2, 28. City Ordinances of Chicopee, c. 12, § 3. The other heads of the department are the three overseers of the poor, one of whom is its chairman. St. 1897, c. 239, §§ 15, 38, 44. These three officials are appointed by the mayor. The city has, *eo nomine*, no city council, nor does the charter require that the appointments of overseers of the poor shall be confirmed by the single board of aldermen. Therefore in this instance, which so far as we have observed is unique, the overseers themselves are exempted by the statute only as "heads of any principal department," which we think they are. They have large powers devolved upon them by the general laws, as well as by the charter. They are given the power to appoint and remove not only the almoner and the city physician but also officers, clerks and employees in their department. St. 1897, c. 239, §§ 44, 48. As to the respondent he is appointed by the overseers, and is removable by them for such cause as they may deem sufficient. All his duties are those of a subordinate, to be performed under the direction of the mayor and of the overseers. He has no power to appoint or discharge any employee who may be in the

department under his own rank. Indeed so far as appears there are no such subordinates. He is not in any sense a head either of the pauper department, or of the department in charge of the administration of the funds to be distributed by the almoners of the Whiting Street will. See *People v. Kipley*, 171 Ill. 44.

Judgment of ouster.

GEORGE W. NICKERSON *vs.* NEW YORK, NEW HAVEN
AND HARTFORD RAILROAD COMPANY.

Barnstable. January 16, 1901. — March 1, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

The selectmen of a town, in a vote to widen and straighten a certain road which crossed a railroad, described the limits of the new road until it reached the railroad, then beginning again on the other side of the railroad described the limits of the road beyond, and then declared "all portions of the old road not included to be discontinued." *Held*, that the highway was not discontinued where it crossed the railroad but in that part remained unchanged.

Upon the issue whether a certain way is a public way the records of the county commissioners dealing with the way as a highway or town way are admissible in evidence.

TORT to recover for injuries suffered by reason of a defect in the planking between the tracks of the defendant at an alleged private crossing of a highway in the town of Orleans. Writ dated July 17, 1899.

At the trial in the Superior Court, before *Richardson, J.*, it was admitted that no notice was given to the railroad company under Pub. Sts. c. 52, § 19, of the time, place and cause of the accident, and that if the defective planking was within the limits of a highway, the plaintiff could not recover.

The plaintiff put in evidence the records of the town of Orleans as to the widening and straightening of a certain road as follows:

"Report of the Selectmen on widening and straightening the road from a point near the dwelling house of Joel Sparrow by the houses of Francis Young and John G. Snow to Eastham line and adopted by the town Feb. 2d, 1874, viz.:

"Commencing on the east line of Rockharbor road at the northwest corner of the front yard of Joel Sparrow thence north 40 east 25 rods over line of road, thence same course 5 rods 4 links over land of Edwin Smith, thence same course 12 rods 7 links over line of road, thence north 77 east 8 rods over land of Mercy Higgins, thence same course 12 rods 23 links over land of Aseneth Swain, thence same course 17 rods 7 links over line of road, thence north 69 east 11 rods over line of road, thence north 12 links over land of Francis Young, thence north 36 east 13 rods 7 links over land of same, thence same course 7 rods over land of Jonathan Young, thence north 64 east 10 rods 16 links over land of same, thence same course 4 rods over land of town to the west line of the railroad.

"Again commencing on the east side of the railroad at the northwest corner of the land of John G. Snow, thence north 58 east 7 rods 10 links over line of road, thence same course 10 rods over land of John G. Snow, thence north 85 east 7 rods 17 links over land of same, thence same course 16 rods 18 links over line of road, thence north 78 east 10 rods over line of road, thence same course 3 rods 2 links over land of Freeman Robbins, thence same course 14 rods over land of Franklin Smith, thence east 10 south 6 rods 18 links over land of same, thence same course 2 rods over land of Heman Smith, thence same course 2 rods 17 links over line of road to a stone monument on Eastham line.

"The above described line to be the south line of the road, and said road to be fifty feet wide north and west from said line, and all portions of the old road not included to be discontinued."

Then followed a list of damages awarded to the owners of land taken.

The defendant presented evidence showing that, long before the date of the widening and straightening of the road from the house of Joel Sparrow to the Eastham line, a road had existed which was used by the inhabitants of Orleans and other persons who had occasion to travel from that part of the town of Orleans to Eastham and from Eastham to that part of Orleans; that this road crossed the land which is now used by the railroad as a crossing where the plaintiff was injured, but no laying out of this road was offered or could be found on the town records.

The defendant, against the objection of the plaintiff and his exception thereto, put in evidence the records of the county commissioners of the county of Barnstable showing the petition of the Cape Cod Railroad Company, to be allowed to cross at grade certain highways and town ways in the construction of the extension of its railroad from Orleans to Wellfleet, and also a decree of the county commissioners upon such petition ordering a crossing to be made and continued at grade. The defendant by competent evidence identified the crossing referred to as the crossing which was passed over in going from Orleans to Eastham before the widening and straightening of the road from Joel Sparrow's to the Eastham line, of which the plaintiff offered record evidence. It was admitted that the defendant had acquired all rights possessed by the Cape Cod Railroad Company at the crossing. No other evidence was offered by the plaintiff or defendant as to the nature of the road at the crossing in regard to being public or private.

At the close of the evidence, the defendant asked the judge to direct a verdict for the defendant on the ground that the plaintiff had not proved his right to maintain his action upon all the evidence in the case. The judge declined so to rule, and under directions not excepted to left to the jury the questions of due care on the part of the plaintiff and negligence on the part of the defendant and whether the road upon which the plaintiff was travelling at the crossing was a highway or other way, such as is mentioned in Pub. Sts. c. 112, § 124, or whether it was a private way.

The jury found for the plaintiff; and the defendant alleged exceptions.

J. H. Beale, Jr., & H. M. Hutchings, for the defendant.

H. P. Harriman, for the plaintiff.

KNOWLTON, J. The bill of exceptions is not free from obscurity in regard to the questions which were submitted to the jury and the instructions which were given. The only exception taken was to the refusal to direct a verdict for the defendant. It is said that the judge gave instructions not excepted to in regard to the various questions in the case. It is agreed that no notice was given of the time, place and cause of the accident, as required by the Pub. Sts. c. 52, §§ 18 and 19, when an accident

happens through a defect or want of repair in a highway or town way. By the Pub. Sts. c. 112, § 124, a railroad corporation is bound to keep such a way in repair at the crossing, when its railroad is crossed by it on a level therewith. If, therefore, the crossing where the accident happened was in a public highway or town way, the plaintiff cannot recover, because he failed to give the notice required by the statute.

The evidence seems to show beyond all reasonable doubt that there was a public way or town way at this point, unless it was discontinued by the town on the report of the selectmen in 1874. Both parties, in their arguments before us, assume that there was such a way there. As we understand the bill of exceptions, there was no dispute that the accident happened within the limits of the way unless the way within the location of the railroad had been discontinued.

With this interpretation of the bill of exceptions, the only question before us is whether the judge should have ruled as a matter of law that the public way within the location of the railroad was not discontinued by the action of the town in widening and straightening the road, or whether he might rule that it was discontinued, or leave the jury to find that there was such a discontinuance. We think that the true construction of the record of widening and straightening is that the road was altered so as to conform to the new line from the corner of the front yard of Joel Sparrow to the west line of the railroad, and then from the east line of the railroad to the line of the town of Eastham, and that so much of the way was discontinued as lay outside the prescribed lines, between the termini on the westerly side of the railroad, and between the termini on the easterly side of the railroad, and that the way within the location of the railroad was not affected by the change on each side of the tracks. For some reason, perhaps because of a real or supposed want of jurisdiction, the town authorities did not undertake to change the way in that part which crosses the location of the railroad. See Pub. Sts. c. 112, § 125; St. 1874, c. 372, § 92; Gen. Sts. c. 63, §§ 57, 58, 59; *Commonwealth v. Haverhill*, 7 Allen, 523. It would require very plain language to indicate an intention by the town authorities to widen or alter a public way to and from a railroad crossing on each side of it, and at the same time to

discontinue the way across the railroad, so as to leave no right in the public to cross the tracks and to pass along the road beyond. It seems to us plain that this was not the intention of the selectmen of Orleans, or of the inhabitants of the town, in making this change. It follows that the previously existing public way across the tracks was not discontinued, but remained unchanged; and the plaintiff, meeting with an accident on account of the improper construction or want of repair of the crossing, should have given a notice to the defendant under the Pub. Sts. c. 52, §§ 18, 19.

The public records of the county commissioners dealing with this way as a highway or town way, under the jurisdiction given them by the statute, were rightly admitted in evidence, as tending to show that this was a public way before the authorities of Orleans widened and straightened it. Pub. Sts. c. 112, § 123. St. 1874, c. 372, § 90. St. 1865, c. 239, § 1.

Exceptions sustained.

CHARLES H. PARKER & others vs. COMMONWEALTH.

FERREE BRINTON & others vs. SAME.

GEORGE F. PARKMAN vs. SAME.

Suffolk. January 17, 18, 1901. — March 1, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

St. 1899, c. 457, limiting the height of buildings within a certain described territory west of the State House in Boston to seventy feet, and providing that "If and in so far as this act, or proceedings to enforce it, may deprive any person of rights existing under the Constitution," the owners of the land thus restricted may have their damages assessed by a jury, does not contain an adjudication that the public welfare requires that the landowners' property should be restricted without compensation to them, and, without such adjudication by the Legislature, the statute does not deprive the landowners of their rights to compensation for the taking of their right to build above seventy feet. Whether a clear expression by the Legislature of its intent to restrict these buildings in the exercise of its police power without compensation to the owners would infringe the Constitution, *quære*.

THREE PETITIONS for the assessment of damages under St. 1899, c. 457, limiting the height of buildings in the vicinity of

the State House in Boston, filed respectively in November and December, 1899, and May, 1900.

The petitioners were respectively the owners of different parcels of land within the restricted territory described in the act above named. In each case the Commonwealth demurred, and in the Superior Court *Braley*, J. made orders sustaining the demurrers, and being of opinion that the matter ought to be determined by the full court before further proceedings were had in the trial court, at the request of the parties, reported the cases for the consideration of this court.

St. 1899, c. 457, was passed by the Legislature on June 2, 1899, and was entitled "An Act to limit the height of buildings in the vicinity of the State House."

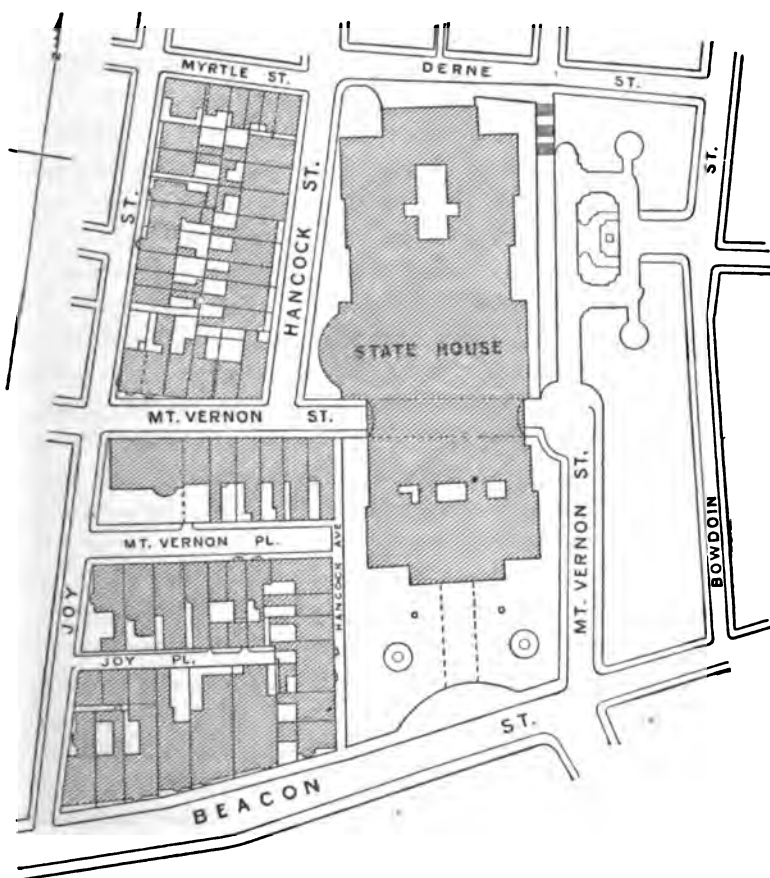
The act was as follows: "Section 1. Any building now being built or hereafter to be built, rebuilt or altered in that part of the city of Boston which lies within the following described territory, to wit:—Beginning at the corner of Beacon street and Hancock avenue, thence continuing westerly on Beacon street to Joy street, thence continuing northerly on Joy street to Myrtle street, thence continuing easterly on Myrtle street to Hancock street, thence continuing southerly on Hancock street and Hancock avenue to the point of beginning, — may be completed, built, rebuilt or altered to the height of seventy feet measured on its principal front and no higher: *provided, however*, that there may be erected on any such building above the limits hereinbefore prescribed, such chimneys and ornamental features as the commissioner of buildings of the city of Boston may approve, but said ornamental features shall not be such as to increase the interior capacity of said buildings.

"Section 2. If and in so far as this act, or proceedings to enforce it, may deprive any person of rights existing under the constitution, any such person now owning land within the district above described, sustaining damages in his property by reason of the limitations of the height provided for in this act of any building on or to be placed on such land may recover from the Commonwealth such damages, as determined by a jury of the superior court for the county of Suffolk, on his petition therefor filed in the office of the clerk of said court within one year after the passage of this act, such determination and pay-

ment of the damages to be made under the same rules of law, so far as applicable, as govern the determination and payment of damages for the taking of lands for highways in said city."

It was agreed that the following facts might be taken as true, and considered as alleged in the petition :

The territory described in the act lies west of the State House grounds and adjacent thereto, being separated therefrom by Hancock Street, Mt. Vernon Street and Hancock Avenue. The plan attached to the record was printed from a tracing from the atlas of the city of Boston. The following is a copy :



Mt. Vernon Place and Hancock Avenue are public streets as are the other streets shown on the plan except Joy Place.

The point in the restricted territory most remote from the State House is at the corner of Beacon and Joy Streets, and is four hundred feet distant from the nearest part of the State House. The shortest distance between the State House and Joy Street, taken in a line perpendicular to Joy Street, is one hundred and eighty-five feet. The length of the territory is the length of the State House and its grounds.

The land between Bowdoin Street and the State House was taken in fee by the Commonwealth under authority of the Legislature before 1899. The land to the north of the State House on Derne Street is still owned by private individuals.

At the date of the passage of the act, none of the buildings erected within the restricted territory exceeded or equalled the prescribed limit of seventy feet in height; the Hotel Otis, at the northeast corner of Joy and Mt. Vernon Streets, having its principal front on Mt. Vernon Street, was sixty-eight feet in height, exclusive of chimneys, measured on the principal front, but there were several buildings on the westerly side of Joy Street, and also to the east of the State House grounds and in their vicinity, which exceeded the height of seventy feet.

The highest point of the land upon which any part of the State House stands is one hundred and eight and forty-two one hundredths feet above the city of Boston base, which is sixty-four one hundredths of a foot below mean low water. The height of the top of the cornice of the Bulfinch front is one hundred and sixty-seven and five tenths feet above the city base. The height of the top of the dome, not including the lantern, is two hundred and four feet above the city base. The height of the extreme top of the lantern is two hundred and twenty-eight and five tenths feet above the city base.

The State House, with its furnishings, above the ground, is valued by the auditor at about \$5,500,000, and contains the State Library, valued at about \$172,000, also department libraries, and State records of which the value cannot be fairly estimated in money and which in their nature are irreplaceable.

The demurrers of the Commonwealth stated the cause of demurrer as follows: That the petitioners have not stated such a case as entitles them to have their damages determined by a jury of the Superior Court, because St. 1899, c. 457, referred to

in their petitions, provides that an owner of land within the district described in said act may have a jury of the Superior Court to determine the amount of certain damages, if and in so far as said act, or proceedings to enforce it, may deprive them of rights existing under the Constitution; and that neither said act, nor proceedings to enforce it, do deprive the petitioners of any rights existing under the Constitution.

A. D. Hill, for the petitioners in the first case.

W. D. Turner, for the petitioners in the second case.

J. L. Thorndike, for the petitioner in the third case.

H. M. Knowlton, Attorney General, & *F. T. Hammond*, Assistant Attorney General, (*F. H. Nash*, Assistant Attorney General, with them,) for the Commonwealth.

HOLMES, C. J. These are petitions by owners of land affected by St. 1899, c. 457, to have the amount of damages assessed which have been sustained by them in their property by reason of the act. The statute in question limits the height of buildings on a small tract west of the State House to seventy feet, and allows these petitions if and in so far as the act, or proceedings to enforce it, may deprive the petitioners of rights existing under the Constitution. The cases are reported upon demurrer and agreed facts.

In some of the arguments addressed to us it was assumed that the only view which it was possible to take of this statute was that it was intended to benefit the State House considered as a dominant estate, and to annex to it an easement or quasi easement, whether for prospect or security it does not matter. Manifestly this is not true. It may be argued that the statute was passed at least as much in the interest of the public at large as travellers on the highway as it was in the interest of the Commonwealth as an owner of property—that one object at any rate was to save the dignity and beauty of the city at its culminating point, for the pride of every Bostonian and for the pleasure of every member of the State. It is on this footing that it is argued for the Commonwealth that the act is a valid exercise of the police power; that a building law would be valid within reasonable limits; *Attorney General v. Williams*, 174 Mass. 476, 478; *People v. D' Oench*, 111 N. Y. 359, 361; *Lewis*, Em. Dom. § 156; that a limitation to seventy feet is reasonable, and that such a law is no less valid when passed to satisfy the love of

beauty than when passed to appease the fear of fire. 174 Mass. 479, 480.

It will be observed that this argument avoids the objection that a police law could not be limited to this narrow tract. For all that appears, and probably in fact, the symmetry of Beacon Hill and the domination of the State House as seen from the western approaches, the Mill Dam or the Cambridge Bridge for instance, are or may be secured without restricting a larger tract, and if so the statute is coextensive with the public need.

The language of the act is, we repeat, that in so far as it "may deprive any person of rights existing under the constitution" those in the petitioners' situation may have a remedy. Of course it is possible to read this as the Attorney General would have us read it, as importing an exercise of the police power so far as the Legislature constitutionally could go, and as saving a remedy for all damages beyond the limit. If interpreted in that way it lets in the argument just stated. The objection to the interpretation is that it supposes the Legislature without clear words to have used the police power in one of its extreme manifestations for a purpose which, although conceded to be public, is a purpose which may be described as of luxury rather than necessity, and which, in part after all, is for the benefit of the State House land and its proprietor merely as such. So that to sustain the restriction to its whole extent under the police power would be a startling advance upon anything heretofore done. If it should be suggested that the restriction might be sustained under the police power beyond a certain number of feet from the ground and compensation allowed for the restriction between that height and seventy feet, apart from the difficulty of fixing a constitutional limit by feet and inches, which might not be insuperable, see *Quinn v. New York, New Haven & Hartford Railroad*, 175 Mass. 150, 151, the answer is that the constitutional difficulty would not grow appreciably less until we reached a point at which the restriction became nugatory because it was beyond the height to which any one would wish to build. Apart from the difficulties which we have stated, and simply reading the words without consideration of consequences, while we can gather that the Legislature was willing to take anything without paying for it that this court

should say that it could, we do not find anything that even suggests a legislative adjudication that the public welfare requires that the petitioners' property should be restricted without compensation to them.

For the foregoing reasons we are of opinion that the construction adopted by the Attorney General must be rejected, and therefore we do not find it necessary to express an opinion whether a law, in which the Legislature, either with a declaration of purposes such as we have imagined for this act or without it, should give clear expression to its intent to restrict these buildings in the exercise of its police power without payment, would infringe the Constitution. Such a law certainly would present grave difficulties even when approached with all the presumptions that exist in favor of a legislative decision, and with the duty to uphold it unless it was impossible to do so. Compare *Farist Steel Co. v. Bridgeport*, 60 Conn. 278, 292, with *Attorney General v. Williams*, 174 Mass. 476, 479, 480. See also *Bent v. Emery*, 173 Mass. 495.

On the construction of the act which we adopt it treats the limits of the police power as if they were a matter which might be left to this court to fix in the first place without any preliminary exercise of legislative judgment. If it stopped here it would raise new difficulties, but it does not. It goes on and gives a remedy if the act deprives the parties of rights existing under the Constitution. In the absence of an adjudication by the Legislature that the public needs require the petitioners' property to be restricted without compensation, the statute does deprive the parties of such rights, and on the construction of the statute which we adopt there has been no such adjudication. The exercise of the police power always deprives a party of what would be his rights under the Constitution but for such an adjudication. The right to build the seventy-first foot from the ground is just as much a right under the Constitution as the right to build the sixty-ninth or the first. It may be of less importance, but it is the same in kind. The justification of a building law is not that it does not qualify or affect a right under the Constitution; if that were the justification the petitioners would be entitled to nothing because no right of theirs would have been infringed. The justification is that although the law

affects or even takes away such rights it may do so within reasonable and somewhat narrow limits upon considerations which the Constitution cannot be supposed to have been intended to exclude.

If it be deemed more logical, instead of saying that a constitutional right is cut down or taken away under an implied constitutional power, to say that the right is limited to the extent of the lawful exercise of the police power, it does not leave the petitioners' case less strong. For under that form of statement also the right exists until the Legislature adjudicates that the public welfare requires its termination without being paid for. That, as we have said, the Legislature has not adjudicated but has left to this court.

Demurrers overruled.

EAST TENNESSEE LAND COMPANY *vs.* JOSEPH R. LEESON.

SAME *vs.* JOHN HOPEWELL, JR.

Suffolk. January 21, 1901. — March 1, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

In a suit in equity brought by a receiver of a corporation, this court held that the bill should have been brought in the name of the corporation and ordered that, upon the substitution of the corporation as plaintiff in place of the receiver, the case should stand for hearing as to the nature and extent of the relief to be granted. The bill having been amended in accordance with this order, the defendant asked leave to amend his answer by setting up the statute of limitations, it being more than six years since the cause of action accrued although that period had not expired when the bill by the receiver was filed. *Held*, that after the substitution of the corporation as plaintiff the suit continued to be the same that was begun by the receiver and the defendant could not set up the statute.

TWO BILLS IN EQUITY to recover alleged secret profits of the defendants as promoters and directors of the plaintiff, a corporation organized under the laws of Tennessee, filed May 31, 1895.

The suit was originally brought by the receiver of the plaintiff and was before this court in *Hayward v. Leeson*, 176 Mass. 310, in which it was decided that the suit should have been brought by the corporation instead of by the receiver and the following

decree was made, which appears in the last paragraph of the opinion in that case: "Upon substituting the East Tennessee Land Company as plaintiff in place of John K. Hayward, the causes are to stand for hearing as to what the net profits are, which the defendants have respectively received, or as to what the damages are, which the plaintiff has suffered, as the plaintiff shall elect to proceed for the property or its proceeds on the one hand, or for damages on the other hand. *Decree accordingly.*"

On October 26, 1900, in accordance with the foregoing decree, the bill was amended by substituting as plaintiff the East Tennessee Land Company in place of John K. Hayward, receiver. On November 5, 1900, in pursuance of a verbal notice given at the time when the plaintiff's amendment was allowed, the defendant Leeson filed a motion for leave to amend his answer by setting up the defence of the statute of limitations in bar of the plaintiff's bill, as follows: "And defendant comes and answers that the cause of action mentioned in plaintiff's bill in equity did not accrue within six years before the suing out of said bill by East Tennessee Land Company as plaintiff, and said bill cannot be maintained by said land company as against this defendant for this reason."

At the hearing in the Superior Court, before *Braley, J.*, it was agreed by the parties that, at the time the bill was filed, May 31, 1895, the cause of action was not barred by the statute of limitations. The defendant contended that the cause of action accrued in 1893, and that the substitution of the East Tennessee Land Company as plaintiff for John K. Hayward, receiver, the original plaintiff, was such a change as to entitle him as matter of law under the facts to plead the statute of limitations in bar of the maintenance of the bill, more than six years having elapsed from the time when the cause of action accrued to the date of the allowance of the amendment.

The judge refused so to rule, and ruled that the appointment of a receiver did not have the effect of changing the right of action or the contractual or fiduciary relations existing between the East Tennessee Land Company and Leeson, as set out in the bill, and that the right of action was that of the corporation, and that the bill as it originally stood was only an attempt on

the part of the receiver in his own name to enforce that right ; and refused to allow the amendment as a matter of law and not as a matter of discretion ; and being of the opinion that the matter ought to be determined by the full court before further proceedings were had in the trial court, at the request of the defendant, reported the ruling and order for the consideration of this court. If the ruling was right the order was to be affirmed ; if not, then the defendant's amendment was to be allowed.

G. F. Ordway, for the defendant Leeson.

W. H. Russell, (*L. G. Farmer* with him,) for the plaintiff.

LORING, J. It is too plain for discussion that the allowance of the amendment did not entitle the defendants to treat the suit as begun at the time it was made. Since the amendment the receiver is *dominus litis*, as he was before it was made, and the suit is being prosecuted for those who, by decree of the court appointing the receiver, are entitled to the proceeds, and for whose benefit it was originally brought. The substitution of the company for the receiver as the party plaintiff was made to comply with the technicalities of our procedure. Such an amendment can be allowed to prevent the defence of the statute being set up to a new suit. *Costelo v. Crowell*, 134 Mass. 280.

Order disallowing amendment to answer affirmed.



ROSCOE NORWOOD & another vs. JENNIE G. LATHROP.

Worcester. October 2, 1900. — March 2, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & HAMMOND, JJ.

When a contractor agrees in writing to erect a building to the satisfaction of the agent of the owner of the land, and erects the building in substantial conformity with the contract but not to the satisfaction of the agent, he can recover on an account annexed the value added to the land by his work and materials, and in many cases this value may be ascertained by deducting from the contract price the amount of diminution of the value of the building by reason of the contractor's deviations from the contract.

A building contract contained a provision that "No alterations shall be made in the work shown or described by the drawings and specifications, except upon a written order of the owner, and when so made, the value of the work added or omitted shall be computed by the architect, and the amount so ascertained shall be added to or deducted from the contract price." *Held*, that the contractor could recover for extra work done upon oral orders of the agent of the owner given with the owner's consent and authority, the requirement of a written order being waived.

The specifications of a building contract contained under the title "Iron Work" the following: "Provide and build in three ornamental balconies on front as shown, securely bolted to the wall, of the value of \$300." The contractor sought to recover the price of the above described balconies as extra work performed outside of his contract, and offered to show that it was agreed by both parties when his contract was made, that the balconies should not be included in his estimate and that they were not included in the contract price, but that afterwards the owner changed his mind and ordered the balconies built. *Held*, that a ruling excluding this evidence was right, the offer of it being an attempt to vary the terms of a written contract by oral evidence. *Held, also*, that in a provision of the contract that the building was "to be completed according to the specifications and drawings (except such work as is reserved to be done by the owner) on or before" a certain day, the expression work "reserved to be done by the owner" meant work thus reserved by the specifications, and did not open the way to the introduction of oral evidence.

CONTRACT on a written building contract with a second count on an account annexed added by amendment. Writ dated September 14, 1898.

The case was heard in the Superior Court, by *Stevens, J.*, without a jury, upon an auditor's report. The judge found for the plaintiffs in the sum of \$2,319.17, the same amount found due by the auditor; and both parties alleged exceptions. The exceptions and the material portions of the auditor's report are described in the opinion of the court.

J. B. Scott, for the defendant.

M. M. Taylor, for the plaintiffs.

LATHROP, J. This action was first brought upon a written contract for building a house for the defendant. The defendant filed an answer, and also a declaration in set-off, to which an answer was filed. The case was then sent to an auditor, who filed a report. On the case coming on for hearing before the court, the case was recommitted to the auditor, who filed a supplemental report. The plaintiffs filed an amendment to their declaration, by adding a second count on an account annexed, the account being the same as was annexed to the first count.

At the final hearing in the Superior Court, the court found

for the plaintiffs for the same amount allowed by the auditor, with interest, and both sides alleged exceptions.

The defendant's exceptions are confined to the refusal of the judge to give three requests for rulings, numbered 2, 5, and 6, respectively. The request numbered 2 is that upon the auditor's report the building was not constructed to the satisfaction of the agent of the defendant; and the plaintiffs cannot recover. While the contract provides that the contractor shall do the work and furnish the materials to the satisfaction of the defendant's agent, and the auditor has found that the materials were not furnished and the work done, to the satisfaction of such agent, he has also found that the plaintiffs erected the building in substantial conformity with the contract, specifications, and plans. For the purposes of the case we may assume that the plaintiffs cannot maintain an action upon the contract, but that does not prevent a recovery upon the common counts, *Gillis v. Cobe*, 177 Mass. 584, and cases cited, even if the defendant's agent was dissatisfied with the work and materials. The ruling requested was rightly refused.

The request numbered 5 is as follows: "That upon the pleadings and the evidence as reported the plaintiffs cannot recover for the contract price, nor any balance thereof as shown by items No. 1 to 11 in the declaration." The account referred to both in the count on the contract and in the second count on an account annexed began by charging the defendant with the contract price, and in the first seven items crediting her with materials furnished and cash paid, and striking a balance. Items 8, 9, 10 and 11 were charged to the defendant for certain materials and labor. This account was not allowed in full by the auditor, but the amount disallowed was less than \$20.

The objection which the defendant now makes is that this was not a proper way for determining the amount the plaintiffs were entitled to recover. Although the true measure of damages where an action will not lie upon the contract, is the additional value to the land of the defendant by reason of the labor performed and the materials furnished by the plaintiffs, (see *Gillis v. Cobe*, *ubi supra*,) yet this value may in many cases be ascertained by deducting from the contract price what the house was worth less to the defendant by reason of the deviations from

the contract. *Hayward v. Leonard*, 7 Pick. 181. *Walker v. Orange*, 16 Gray, 193. *Cardell v. Bridge*, 9 Allen, 355. *Powell v. Howard*, 109 Mass. 192. *Cullen v. Sears*, 112 Mass. 299. *White v. McLaren*, 151 Mass. 553. *McCue v. Whitwell*, 156 Mass. 205, 207. We see nothing in the facts found by the auditor to take the present case out of this rule.

The request numbered 6 is as follows: "That the bill of extras declared on is, by article 3 of the contract and by the pleadings, made a part of the contract, and if there can be no recovery on the contract as requested in No. 5, there cannot be on the bill of items numbered from 12 to 56." Article 3 of the contract provides as follows: "No alterations shall be made in the work shown or described by the drawings and specifications, except upon a written order of the owner, and when so made, the value of the work added or omitted shall be computed by the architect, and the amount so ascertained shall be added to or deducted from the contract price."

The auditor has found in his supplemental report that some of these items were furnished on written orders signed by the agent, and that certain other items which he has allowed were furnished upon oral orders of the agent, and that as to these all of them were made with the defendant's consent and authority; and that the defendant waived the requirement of a written order. As the judge followed the auditor in this respect, we see no ground for this exception.

The defendant took an appeal from the order recommitting the case to the auditor; but as to this no argument has been submitted to us, and we regard it as waived.

We come now to the plaintiffs' exceptions. These relate to the refusal of the auditor and the court to include in the amount allowed for extras an item for \$300 for three iron balconies. By the terms of the specifications, under the title "Iron Work," the plaintiffs were to "provide and build in three ornamental balconies on front as shown, securely bolted to the wall, of the value of \$300." The exceptions state that this provision was never amended; and that the plaintiffs furnished and built in three iron balconies upon the front of the building.

The only ground upon which the plaintiffs contend that the item should have been allowed is the offer of evidence, excluded

by the court, that prior to and contemporaneously with the making of the contract, conversations were had between the plaintiffs and the defendant's agent and architect, who carried on the preliminary negotiations in her behalf, that the bid which the plaintiffs made did not include the balconies; that the defendant's agent and architect informed the plaintiffs that the defendant had not concluded whether to have them placed upon the building or not; that the furnishing of the balconies was to be an after consideration.

It seems to us very clear that the ruling of the judge excluding the evidence offered was right. It was simply an attempt to vary the terms of a written contract by oral evidence.

The chief contention of the plaintiffs, in support of the proposition that the evidence is admissible, is that article 6 of the contract shows that some work was reserved to be done by the owner; and that what this was would necessarily have to be shown by oral evidence. Article 6 provides: "The contractor shall complete the several portions, and the whole of the work comprehended in this agreement by and at the time or times hereinafter stated, the whole work and building is to be completed according to the specifications and drawings, (except such work as is reserved to be done by the owner) on or before" a day named.

There is nothing in the contract to show what work was reserved to be done by the owner. But we cannot assume that the specifications did not show this fact; and it may at least be said that they did show that the plaintiffs were to build the balconies.

It follows therefore that the exceptions of both the plaintiffs and the defendant must be overruled; and that the appeal of the defendant must be dismissed.

So ordered.

WILLIAM B. DE LAS CASAS & others, petitioners.

Suffolk. December 10, 11, 1900. — March 2, 1901.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

St. 1893, c. 407, establishing a metropolitan park commission provided in § 3 that "The jurisdiction and powers of said board shall extend to and may be exercised in" certain cities and towns named "which cities and towns shall constitute the Metropolitan Parks District." Dedham was one of the towns named. By St. 1897, c. 226, all territory within the town of Dedham southwesterly of a certain line was incorporated as the town of Westwood. Section 5 of the last named act provided that the town of Westwood should assume and pay its just and equitable proportion of any debt due or owed by the town of Dedham at the time of the passage of the act "including its proportion of any obligation on the part of the town of Dedham for the expenses of the metropolitan parks and the metropolitan sewers, until a new apportionment is made concerning the same." Upon a motion by the Attorney General for the acceptance of the award of commissioners appointed under St. 1899, c. 419, to determine the proportion in which the cities and towns of the Metropolitan Parks District should pay money into the treasury of the Commonwealth, annually, until the next award five years later, there was a counter motion by the town of Westwood that the petition might be dismissed as to that town, on the ground that it was not liable to such assessment, being no longer part of the town of Dedham. *Held*, that the Metropolitan Parks District was territorial, and the setting off of Westwood as a new town did not take it out of the district or exonerate it from future charges, and that the words "until a new apportionment is made concerning the same" above quoted mean that when a new apportionment is made Westwood will be included, and not that its liability will then cease.

The discretion given to commissioners appointed under St. 1899, c. 419, to determine the proportions to be paid by cities and towns within the Metropolitan Parks District for the next five years, is not wholly arbitrary, but is to be exercised under the supervision and subject to the sanction of the court, and the commissioners should report the grounds of their determination so far as to enable the court to see that no constitutional rights have been impaired and that there has been no error of law in their award. It is not sufficient for the commissioners to report percentages and to certify that they deem them just and equitable.

PETITION by the metropolitan park commissioners under St. 1899, c. 419, for the appointment of commissioners to determine and make award of the proportions in which each of the cities and towns within the Metropolitan Parks District shall annually pay money into the treasury of the Commonwealth for the first period of five years, to meet the interest and sinking fund requirements and provide for the expenses set out and referred to in § 1 of that act, filed March 26, 1900.

Under this petition apportionment commissioners were appointed by a decree made by a single justice of this court.

The apportionment commissioners after several hearings made and returned to the court their determination and award.

The case came on for hearing before *Barker, J.*, on a motion of the Attorney General for the acceptance of this determination and award, a motion of the town of Brookline for a recommittal of the award to the apportionment commissioners, and a motion to dismiss and an answer of the town of Westwood, in which that town alleged that it was not a part of the Metropolitan Parks District and was not liable to apportionment under the statute.

After hearing, the justice denied the motion for recommittal, and ordered a decree to be entered accepting the award.

The town of Brookline appealed to the full court from the order denying the recommittal, and the towns of Brookline and Westwood also appealed from the decree accepting the award, and at the request of both towns the justice reported the case for the consideration of the full court.

A table annexed to the report prepared for the apportionment commissioners, and used by them in making up their award, stated the amounts required annually, as estimated by the State treasurer, to meet the sinking fund, interest and maintenance charges of the various loans, and gave the valuations of the various cities and towns in the district, the percentages and amounts which each would pay if assessed on the basis of valuation, and also the population of the various cities and towns, and the percentages and amounts which each would pay if assessed upon the basis of population, and the mean percentage of valuation and population of the various cities and towns, and the amounts which the various cities and towns would pay if assessed upon the basis of the mean percentage of valuation and population.

A paper prepared by the metropolitan park commissioners at the request of the apportionment commissioners was put in evidence before the apportionment commissioners, which showed the area in acres, and the approximate expense paid or incurred in the acquirement of the various park reservations, and also the approximate expense paid or incurred by the metropolitan

park commission for the metropolitan parkways and boundary roads.

At the hearings before the apportionment commissioners it was admitted that in 1895 the population of that part of Dedham which is now Westwood, was 980, and the population of Dedham as it now exists geographically was then 6,231. It was also admitted that at the time the town of Westwood was incorporated the valuation of that part of Dedham which is now Westwood was \$925,000, and that the valuation of Dedham as it now exists geographically was then \$7,857,541.

At the hearings before the apportionment commissioners the following requests for rulings were made by the town of Brookline: 1. That a determination of the special benefits received by the various towns and cities from the various reservations and boulevards should be one of the elements in the apportionment. 2. That population and valuation should be taken into account in the apportionment.

At the same hearings the following requests for rulings were made by the town of Westwood: 1. The town of Westwood is not a part of the Metropolitan Parks District. 2. The town of Westwood is not liable to apportionment under these proceedings. 3. This petition cannot be maintained against said town.

The apportionment commissioners were Charles Francis Adams of Lincoln, Thomas M. Stetson of New Bedford and John C. Hammond of Northampton. They filed a report with tables appended in which were set against the cities and towns in the Metropolitan Parks District, including the town of Westwood, the percentage proportions which the commissioners found to be just and equitable respectively for each, but did not state the basis upon which their apportionment was made.

Section 3 of St. 1893, c. 407, establishing the metropolitan park commission, is as follows: "The jurisdiction and powers of said board shall extend to and may be exercised in the cities of Boston, Cambridge, Chelsea, Everett, Lynn, Malden, Medford, Newton, Quincy, Somerville, Waltham and Woburn, and in the towns of Arlington, Belmont, Braintree, Brookline, Canton, Dedham, Dover, Hingham, Hull, Hyde Park, Melrose, Milton, Nahant, Needham, Revere, Saugus, Stoneham, Swampscott, Wakefield, Watertown, Wellesley, Weston, Weymouth,

Winchester and Winthrop; which cities and towns shall constitute the Metropolitan Parks District."

Section 5 of St. 1897, c. 226, incorporating the town of Westwood, begins as follows: "Said towns of Westwood and Dedham shall each retain and hold all the town property, real or personal, now in or belonging to their respective limits. And the town of Westwood shall assume and pay its just and equitable proportion, according to its present assessed valuation, of any debt due or owed from the town of Dedham at the time of the passage of this act, including its proportion of any obligation on the part of the town of Dedham for the expenses of the metropolitan parks and the metropolitan sewers, until a new apportionment is made concerning the same."

Section 1 of St. 1899, c. 419, providing for apportionment commissioners, is as follows: "In the year nineteen hundred and in every fifth year thereafter the supreme judicial court in equity, on application of the metropolitan park commission or of the attorney-general, or of any city or town of the metropolitan parks district by its attorney, and after such notice as the said court may order to each city and town of that district, shall appoint three commissioners, neither of whom shall be a resident of any city or town in said district, who shall, after such notice and hearing as they deem sufficient and in such manner as they deem just and equitable, determine and make award of the proportions in which each of the cities and towns of said district shall annually pay money into the treasury of the Commonwealth, beginning with the first day of January of the year in which such commissioners are required to be appointed, until the first day of January of the year in which a new award is made hereunder, to provide the amount for that year as estimated by the treasurer of the Commonwealth to meet the interest and sinking fund requirements of the appropriations and loans authorized by chapter four hundred and seven of the acts of the year eighteen hundred and ninety-three, chapter two hundred and eighty-eight of the acts of the year eighteen hundred and ninety-four, chapter three hundred and five of the acts of the year eighteen hundred and ninety-five, and all acts in addition thereto and in amendment thereof, and the amount required to meet the expenses for that year of said board of metro-

politan park commissioners and of the care, maintenance and operation for that year of the parks, reservations, boulevards and other works acquired, cared for or controlled by said board under said acts, as annually authorized by the general court, and the deficiency, if any, in the estimates and payments for the preceding year as found by said treasurer, and shall return their award thus determined into said court: *provided, however*, that the commissioners shall fix and return the proportion to be paid by the city of Boston for each year of the first of said terms at fifty per cent. Every such award when accepted by said court shall be a final and conclusive adjudication for the term for which it is made, of all matters referred to the commissioners, and shall be binding upon all parties."

C. A. Williams, for the town of Brookline. .

C. F. Jenney, for the town of Westwood.

F. H. Nash, Assistant Attorney General, for the petitioners.

HOLMES, C. J. This case came before a single justice of this court upon a motion of the Attorney General for the acceptance of the determination and award of commissioners appointed under St. 1899, c. 419, to determine the proportion in which the cities and towns of the Metropolitan Parks District shall pay money into the treasury of the Commonwealth, annually, until the next award five years later. There was a counter motion by the town of Brookline that the award should be recommitted with instructions to the commissioners to report the method adopted for the apportionment, and whether the apportionment was based upon valuation or population, or special benefits or otherwise, and as to their rulings upon requests for rulings submitted to them by the town. There was also a further motion by the town of Westwood that the petition under which the commissioners were appointed be dismissed so far as it was concerned, on the ground that it was not liable for assessments under the above mentioned act. The single justice ordered a decree to be entered accepting the award, and reported the case to this court.

We will deal first with the motion of the town of Westwood. By the original statute, St. 1893, c. 407, § 3, it was enacted that the jurisdiction and powers of the metropolitan park commission "shall extend to and may be exercised in" certain cities

and towns named, "which cities and towns shall constitute the Metropolitan Parks District." It is plain that these words, whatever else they may convey, express a territorial limit, as is made still plainer by the language of § 6, which speaks of "a city or town within the said district." In like manner the statute authorizing the park commissioners to construct roadways speaks of "any lands . . . within said district." St. 1894, c. 288, § 1. One of the towns named and within the district was Dedham. Afterwards by St. 1897, c. 226, § 1, a certain portion of "territory now within the town of Dedham" was "incorporated into a separate town, by the name of Westwood," with the usual division of property and liabilities. By § 5 Westwood was to pay its just and equitable proportion, according to its present assessed valuation, of Dedham's debt due at the time of the act, "including its proportion of any obligation on the part of the town of Dedham for the expenses of the metropolitan parks and the metropolitan sewers, until a new apportionment is made concerning the same." The question is whether this territory remained within the district for purposes of future liability notwithstanding its separate incorporation.

We are of opinion that the setting off of Westwood as a new town did not take it out of the district, or exonerate it from future charges. We have gone far toward the conclusion when we have said that the Metropolitan Parks District was territorial, whatever else it might be. Starting with this proposition, the words just quoted "until a new apportionment is made concerning the same," must be taken not to fix a time at which all liability of Westwood will cease, but to imply that when a new apportionment is made Westwood will be included and will pay whatever it then is ordered to pay. This is implied by expressing that until that time it shall take its share of Dedham's duty under the last one. The territorial limits of the district remain unchanged by a subdivision of a township within it.

We turn to the motion of the town of Brookline. It hardly is disputed that the Legislature had power to throw the expense of the metropolitan parks upon the towns and cities constituting the district. *Kingman, petitioner*, 153 Mass. 566, 572-575. *Adams, petitioner*, 165 Mass. 497. *Attorney General v. Williams*, 174 Mass. 476, 478, 479. It is not disputed either that the

Legislature might give to commissioners the power of apportionment given to these commissioners by the act of 1899. That is settled, and it is settled that the power may be granted with no more definite regulation for the commissioners' action than that, as here, they shall determine the proportions "in such manner as they deem just and equitable," their award to be final when accepted by the court. *Kingman, petitioner*, 153 Mass. 566, 577, *et seq.* *Adams, petitioner*, 165 Mass. 497, 499. The characteristically clear and exhaustive judgment of Mr. Justice Charles Allen in the Kingman case brings out plainly the large latitude that must be allowed and that has been allowed in determining the weight which is to be given to particular considerations. In the present case the Legislature has adjudicated that half the expenses in question should fall on Boston, and half on the remaining territory designated. All that is left is the question, relatively one of detail, as to how the latter half should be apportioned. With regard to such a question the observations of Mr. Justice Allen apply with peculiar force.

It follows from what we have said that we should be slow to disturb an award except in the unlikely event of its appearing "extravagant and unreasonable." Nevertheless, as is pointed out in *Kingman, petitioner*, 153 Mass. 566, 579, the discretion given to the commissioners is not wholly arbitrary, but, as is stated in that case, is to be exercised under the supervision and subject to the sanction of this court. It is deemed of importance that the award is to take effect only when it shall have been accepted by the court, and it is concluded from that provision that the parties have a right to be heard, as they have been, upon the question of acceptance. But if the parties are to be heard, and especially when the complaining party has called the attention of the commissioners by a request for a ruling to a proposition of law upon which it relies, we are of opinion that it is proper that the commissioners should report the grounds of their determination so far as to enable the court to see that no constitutional rights have been impaired, within the principles laid down in the Kingman case. Excessive minuteness is unnecessary. *Adams, petitioner*, 165 Mass. 497, 501. The court is not to revise the judgment of the commis-

sioners but simply to see that in their award there has been no error of law. *Old Colony Railroad, petitioner*, 163 Mass. 356, 359. But it is not sufficient for the commissioners simply to report percentages and to certify that they deem them just and equitable. As has been the practice on former occasions, the grounds of their judgment must be submitted to the court. *State v. Mayor & Aldermen of Paterson*, 8 Vroom, 412. See *Wrentham v. Norfolk*, 114 Mass. 555, 561.

Motion of town of Westwood overruled. Report recommitted.

CHESTER SPRAGUE & another vs. A. P. BROWN & another.

Middlesex. January 8, 1901. — March 2, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Whether a seisin is instantaneous must depend upon all the facts and circumstances of the case. If there is no dispute in regard to the facts, the question whether the seisin was instantaneous is one of law for the court. If the facts are in dispute, the question is for the jury under suitable instructions.

A finding of a jury, that a deed from A. to B. and a mortgage from B. to C. "were delivered simultaneously at the Registry of Deeds" on a certain day, does not conclusively show that the deed and mortgage constituted parts of one transaction in which the seisin was instantaneous, and in the absence of a finding by the jury that the seisin was instantaneous, it cannot be said to be so as a matter of law.

If, in a suit to establish a mechanic's lien as against a mortgagee from A., it appears that A. had only an instantaneous seisin of the land on which the lien is claimed, yet if it also appears that A. falsely represented to the petitioner that he was the owner of the land and thereby induced the petitioner to enter into the contract under which his lien is claimed, and the mortgagee when he took his mortgage knew of the petitioner's claim of lien and also of the false representation and inducement, whether the mortgagee as well as A. would not be estopped to deny A.'s ownership of the land, *quære*.

PETITION to enforce a mechanic's lien for lumber furnished for a building erected on certain land in Watertown under a contract with one A. P. Brown against said Brown and Frank E. Sanborn, mortgagee of the said land, filed July 22, 1896.

At the trial in the Superior Court, the following questions were submitted to the jury and answered by them in writing as follows:

"1. Did the petitioners in the above entitled action furnish the materials set forth in their petition, or any part thereof, and were they actually used, in the erection, alteration or repair of the building upon the premises described in said petition?"

"Yes."

"2. Did the petitioners furnish the materials upon the building by virtue of an agreement with the owner or with any person or persons having authority from or acting for the owner?"

"Yes." "If there was such an agreement, what was its date?"

"February 4, 1896."

"3. Did the respondent Brown have authority from the owner of the land to erect a building on the premises described in the petition?" "Yes."

"4. Did the petitioners within thirty days after they ceased to furnish materials for said building, file in the Registry of Deeds a statement as prescribed by Pub. Sts. c. 191, § 6, and the amendments thereof?" "Yes."

"5. Did the petitioners commence their suit within ninety days after they ceased to furnish materials upon the building?" "Yes."

"6. Did the petitioners perform their contract?" "Yes."

"7. Are the prices charged by the petitioners in their account a reasonable charge for the materials furnished?" "Yes."

"8. Was the owner of the land the purchaser of the materials from the petitioners?" "Not at the time the contract was made, but was April 14, 1896."

"9. Did the petitioners give notice in writing to the owner of the property to be affected by the lien before furnishing the materials that they intended to claim a lien?" "No."

"10. Was there any contract between the petitioners and the respondent Brown made at a time when Brown held the title to the property prior to the delivery of the mortgage by Brown to the respondent Sanborn, under which the petitioners furnished the materials, or any portion of them?" "The only express contract was that made on February 4, prior to the mortgage, and which still continued in force at the time the mortgage was given. The deed from Lyman to Brown and the mortgage from Brown to Sanborn were delivered simultaneously at the Registry of Deeds on April 14, 1896."

"11. Did the respondent Brown, prior to the time of making the contract with the petitioners, represent to the petitioner Sprague that he, Brown, was the owner of the lot of land or premises described in the petition?" "Yes."

"12. Was such representation made by Brown with knowledge of its falsity and for the purpose of inducing the petitioners to furnish materials for the erection of a building on the lot in the belief that they were furnishing them to the owner and would have a lien upon the land therefor?" "Yes."

"13. Did the petitioners believe and rely upon such representation, and were they induced thereby to make the contract for furnishing materials and to furnish the materials?" "Yes."

"14. Was such representation a material inducement to the petitioners to enter into the contract and furnish the materials, so that the petitioners would not have made the contract but for such representation?" "Yes."

"15. Did the respondent mortgagee, Frank E. Sanborn, know at the time he took his mortgage upon the premises that the petitioners had a claim for materials furnished to Brown and used upon the premises described in the petition for which they had not been paid?" "Yes."

"16. Did the respondent mortgagee, Frank E. Sanborn, know at the time he took his mortgage upon the premises described in the petition that the petitioners had a claim of lien upon the premises for materials furnished upon the premises?" "Yes."

"17. Did the respondent mortgagee, Frank E. Sanborn, at the time he took his mortgage, know of the fraudulent or false representations of Brown to the plaintiffs in relation to Brown's ownership of the land upon which the building was to be erected." "Yes."

Upon the motion of the petitioners, the Superior Court made a decree establishing the lien and ordering a sale; and the respondent Frank E. Sanborn appealed.

J. W. Spaulding, for Sanborn.

J. H. Vahey & G. L. Mayberry, for the petitioners.

MORTON, J. This is a petition to enforce a mechanic's lien. Certain issues were submitted to the jury, seventeen in all, which were duly answered by them, and on motion of the petitioners

that "a lien be established upon the lot of land described in the petition, for the amount of their claim," a decree was entered that, "it appearing . . . that the allegations in the plaintiffs' petition, material to the judgment in this case, are sustained," there was due the petitioners the sum of \$577.69 debt and costs, and it was ordered that the premises be sold pursuant to the provisions of law in such case made and provided. From this decree the respondent Sanborn, the mortgagee, appealed. No ruling was asked for by him, and no exception was taken by him. The case is before us on the petition, the answer of the respondent Sanborn, the issues to the jury and their answers thereto, the petitioners' motion that a lien be established, the decree, and the respondent Sanborn's appeal therefrom. The question which the mortgagee seeks to raise is whether upon the issues submitted to the jury and their answers the petitioners are entitled to maintain their lien. But it does not appear from the record that no other evidence was before the court than that embraced in the issues and the answers to them. For aught that appears other evidence may have been introduced. If there was other evidence then the appeal only raises the question whether upon all the evidence the decree was correct. It does not raise the question whether upon the issues and answers the petitioners were entitled to a decree. Very likely the issues and answers were all that was before the court as the basis of its decree. But it is not so stated and we must take the case as we find it.

Even if we assume, however, that the question which the mortgagee seeks to raise is properly raised, we think that the decree must be affirmed. The mortgagee contends that Brown's seisin was only instantaneous. But the jury did not so find. What they found was that, "The deed from Lyman to Brown and the mortgage from Brown to Sanborn were delivered simultaneously at the Registry of Deeds on April 14, 1896." It does not follow conclusively that because the delivery of the two instruments was simultaneous they constituted parts of one transaction in which the seisin was instantaneous. *Webster v. Campbell*, 1 Allen, 313. They may have been so delivered as matter of convenience merely. Whether a seisin is instantaneous "must depend upon all the facts and circumstances of the case."

Webster v. Campbell, ubi supra. If there is no dispute in regard to the facts the question whether the seisin was instantaneous is one of law for the court. If the facts are in dispute the question is for the jury under suitable instructions. *Woodward v. Sartwell*, 129 Mass. 210. In the present case no issue was submitted to the jury in regard to the question of instantaneous seisin. Apparently the mortgagee relies on the finding that the delivery of the deed and the mortgage were simultaneous to establish an instantaneous seisin. But for reasons already given we do not think that it follows as matter of law that the seisin was instantaneous because the delivery of the two instruments was simultaneous. In *Saunders v. Bennett*, 160 Mass. 48, it is expressly stated that the conveyance and mortgage were parts of the same transaction. In *Ettridge v. Bassett*, 136 Mass. 314, 315, it is also expressly stated that "The warranty deed, mortgages, and agreement were executed and delivered at the same time, and as parts of the same transaction," and in *Perkins v. Davis*, 120 Mass. 408, there was evidence which this court held would have justified a finding that there was an instantaneous seisin. Whether in this case the issues and answers would have justified a finding that Brown's seisin was only instantaneous we need not inquire. The question is not whether such a finding would have been justified but whether it was required as matter of law, and we do not think that it was. If Brown's seisin was not instantaneous, then the petitioners had a valid lien. *Corbett v. Greenlaw*, 117 Mass. 167. *Courtemanche v. Blackstone Valley Street Railway*, 170 Mass. 50, 58. In view of the findings of the jury that Brown falsely represented to the petitioners that he was the owner of the premises, that the petitioners were induced thereby to enter into the agreement which they did with him, and that the mortgagee when he took his mortgage knew that the petitioners had a claim of lien on the premises and that Brown had falsely represented to them that he was the owner, we doubt whether the mortgagee would stand in any better position than Brown even if the seisin was an instantaneous one. It is not necessary however to consider that question. For the other reasons above stated we think that the decree should be affirmed.

So ordered.

LEWIS E. FOSGATE vs. INHABITANTS OF HUDSON.

Worcester. January 9, 1901. — March 2, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

In a suit for the assessment of damages for the taking of the petitioner's land and water rights by a town under a statute providing for the enlargement and improvement of its water supply, the petitioner sought to recover for injury to his pasture by the taking of the water of two brooks crossing it used by him for watering his cattle. It appeared that previously a pond adjoining the petitioner's pasture had been taken by the town as a water supply, reserving to the owners of the petitioner's land the right for their cattle to come to the pond to drink "and to otherwise enjoy the use of said pond in so far as the same shall not pollute or contaminate the purity of the water therein or unreasonably interfere with the use and enjoyment thereof by the town . . . as a reservoir to supply the inhabitants of said town with pure water." It further appeared that, with the waters of the brooks diverted, the pond was the only place at the pasture where the petitioner's cattle could be watered. *Held*, that the petitioner could ask witnesses, qualified as experts, whether in case the petitioner's cows going to the pond to drink should pollute the water and in consequence should be excluded altogether from the pond as a drinking place, the taking of the waters of the brooks would not be a serious injury to his pasture.

One through whose land a brook flows cannot wholly divert its waters, but must use them in such a manner as not materially to interfere with the flow of the water in the brook below.

Where a town, under a statute providing for the enlargement and improvement of its water supply, took certain land described and also took "all the water, water rights and water supply, flowing to or from the premises," this was held to include a brook which lay partly within the land taken and which flowed within the land into another brook.

In assessing damages for land taken by a town under a statute providing for the improvement of its water supply, although the damages are to be assessed as of the time of the taking, the owner may show the possibilities of the land for future use and the nature of such uses.

PETITION to recover for taking land, water and water rights in the town of Berlin, in the county of Worcester, by the town of Hudson in the county of Middlesex, under and by virtue of the provisions of St. 1898, c. 222, filed June 26, 1899.

At the trial in the Superior Court, before *Stevens, J.*, the following facts appeared: The taking was to enlarge and improve the respondent's system of water supply established under the provisions of St. 1888, c. 149. St. 1898, c. 222, § 1, provides that the respondent town, to effect such "enlargement and improvement may take and hold in fee, by purchase or otherwise,

land in the town of Berlin situate on Fosgate brook, so called, a stream north from Gates pond in said Berlin, together with the water and water rights belonging to said brook or tributary thereto, may erect a dam on and across said brook, and by a pipe or aqueduct may conduct the water of said brook into said Gates pond, the water supply of said town of Hudson. For the purpose of laying said pipe or aqueduct the town of Hudson may take and hold as aforesaid land for such use."

On June 30, 1898, the town of Hudson took in fee thirty-seven and fifty-seven one hundredths acres of land belonging to the petitioner, with all the water and water rights thereon; and also a strip of land thirty feet wide in which to lay one or more pipes or aqueducts to convey the water to Gates Pond. This strip was not taken in fee, and the pipe line was not to be fenced.

The location contained the following words: "Also we do hereby take and hold in manner and form aforesaid, all the water, water rights and water supply, flowing to or from the premises above described, for the purpose of conveying the water by a pipe, pipes or aqueduct to Gates Pond, so called, in said Berlin, the same being the water supply of said town of Hudson."

On the petitioner's farm was a brook flowing through and out of the farm, called Fosgate Brook, and into Fosgate Brook, as a tributary, flowed Joslin Brook, forming a junction with Fosgate Brook at a point within the area taken by the respondent. This brook rose outside of the land of the petitioner, and flowed through it to its junction with Fosgate Brook.

There was evidence that after the taking of 1898 the respondent cleared out the channel of Joslin Brook, both in the petitioner's land and above and outside the taking.

Fosgate Brook, after its junction with Joslin Brook, flowed before the taking through the petitioner's pasture described below, and through his barnyard, in both of which places the petitioner had for a long time been accustomed to water his horses and cattle.

At the date of taking, the petitioner owned about one hundred and fifty-two acres of land, with a dwelling-house, barn and dairy-house thereon, and some twenty rods north from these

buildings, on the east side of the road, another barn, where he kept his cows. To this latter barn water was conveyed, and had been, since 1849, by a half inch lead pipe, from a well one hundred rods to the west, on high land included in the tract taken in fee by the respondent. A pasture to the south, containing some twenty acres, formed a part of this farm and bordered for a considerable distance on Gates Pond. This was conveyed to the petitioner in 1892. When Gates Pond, on June 4, 1884, was taken by the town of Hudson, under St. 1883, c. 149, as a water supply, the petitioner was not the owner of this pasture nor of any land bordering on Gates Pond. At that date John G. Fosgate, an uncle of the petitioner, and Marshall Fosgate were owners of the pasture and much of the rest of the farm. When the respondent took Gates Pond it took a strip of land around it, and a reservation was made to the eight owners of land bordering thereon as follows:

“The aforesaid premises are taken for the purpose of enlarging the area of said Gates Pond as occasion may require and for the purpose of preserving the purity of the water thereof in converting the same into said reservoir to supply the town of Hudson with water.

“In this taking, the reservation is expressly made to the eight landholders last above named, their heirs and assigns, for their cattle to come to said Gates Pond to drink and to the said owners, their heirs and assigns, to come to said pond to cut ice for domestic purposes and to otherwise enjoy the use of said pond in so far as the same shall not pollute or contaminate the purity of the water therein or unreasonably interfere with the use and enjoyment thereof by the town of Hudson aforesaid as a reservoir to supply the inhabitants of said town with pure water.”

On April 22, 1885, John G. Fosgate and Marshall Fosgate, the petitioner's grantors, gave the respondent a quitclaim deed of their land taken under the act.

At the trial the petitioner contended, and there was evidence to show, that by the taking of 1898 of the thirty-seven and fifty-seven one hundredths acres he was deprived of a water supply; that the respondent had diverted the waters of Fosgate and Joslin brooks, below their junction, from the petitioner's pasture

and barnyard. The petitioner contended that the deed of John G. Fosgate and Marshall Fosgate to the respondent, of April 22, 1885, deprived the petitioner from going to Gates Pond to water his cattle. But the court ruled that the reservation referred to above was not lost by the deed of April 22, 1885, and that the petitioner as owner of the pasture was entitled to the enjoyment of the rights thereby reserved.

The petitioner also contended, and there was evidence to show, that by the diversion of the brooks his pasture and other land were wholly deprived of water, and that if the use of Gates Pond as a watering place for cattle should, in view of the fact that its waters were used for drinking and domestic purposes by the respondent, amount to a pollution or contamination of the purity of the water, and the petitioner, in consequence of such pollution, be shut off from watering his cattle there, the taking and diversion of the waters of the brooks would be a very serious damage.

One Hastings, an expert witness for the petitioner, was asked by the petitioner the following question: "Suppose that the going of the cows to the pond to drink, the wading in and standing in the water as cows sometimes do, pollutes the water of Gates Pond so that he would be cut off upon that ground from having his cows water at Gates Pond, what do you say would be the effect upon that land?"

The judge admitted this question against the objection of the respondent; and the respondent excepted.

The witness answered: "Practically that would destroy the land for a pasture altogether, without some means to supply some water."

One Lewis, a witness for the respondent, was asked on cross-examination by the petitioner the following question: "Suppose the town of Hudson has the right, if the use of Mr. Fosgate's cows of that drinking place pollutes the water, to prevent cattle from going there, and suppose, as I have, that the cows going in there does pollute it, it being water used for drinking purposes, and in consequence of its pollution his cows are shut off altogether from Gates Pond as a drinking place, then is n't the loss of that running stream through his pasture a serious injury?"

To this question the respondent objected. It was admitted by the judge, and the respondent excepted.

The witness answered : "Certainly, if cut off wholly from the pasture it would be a damage to it. According to the extent of the pasture and feed."

In his charge to the jury the judge gave the following instructions in regard to the rights of the petitioner in Joslin Brook :

"I assume from the evidence in this case that there is no dispute but that Joslin Brook was a natural stream and the riparian proprietors or people on the line or borders of that brook had the rights which riparian proprietors always have, and had the right therefore which this petitioner had in Fosgate Brook, so called, before the taking by the town of Hudson. He had the right and he has the right now to use the waters reasonably of Joslin Brook so far as he can do so without interfering with the rights of the town of Hudson or the riparian proprietors below him. He has not the right materially to diminish the flow of the water to which the owners below him are entitled, but he has the right to make a reasonable use of that water, so far as he may do it without materially interfering with the natural flow of the water to which the owners below, and the town of Hudson, who is the owner, are entitled. He has not the right to divert the waters of Joslin Brook for the purpose of selling such water, he has only the right to divert it so far as he may do so for the use of the farm and in such a manner as not to materially interfere with the flow of the water in the brook below."

After the charge, the respondent requested the judge to instruct the jury as follows : First, the petitioner has the right to divert the waters of Joslin Brook for all legitimate purposes in connection with his farm. Second, the town of Hudson, under the evidence, has not taken the waters of Joslin Brook and cannot interfere with the particular riparian rights therein.

The judge declined to give these instructions, in the form presented, and the respondent excepted.

The petitioner argued to the jury that he was entitled to have them consider, in assessing his damages, the possibilities to which his estate might be put in the future ; that is, possibilities for future development. The respondent asked the judge to in-

struct the jury: "The petitioner is not entitled to have damages assessed because of the possibilities of the future or a future development." This instruction the judge declined to give, and the respondent excepted.

The jury found for the petitioner and assessed damages in the sum of \$5,226; and the respondent alleged exceptions.

J. W. Corcoran & J. T. Joslin, for the respondent.

C. F. Choate, Jr., for the petitioner.

MORTON, J. This is a petition to recover damages for the taking of land, water and water rights by the respondent for the purpose of enlarging its water supply. The case is before us on exceptions by the respondent to the admission of certain evidence for the petitioner and to the refusal of the court to give certain rulings that were requested by the respondent.

The question in regard to evidence relates to the damages caused by the diversion of the waters of Fosgate and Joslin Brooks from the petitioner's pasture, barnyard and other land. The pasture extended to Gates Pond which the respondent had appropriated for a water supply by a former taking, and to which, under a reservation in that taking, the petitioner had a right of access for his cattle to come to drink and for other purposes, "so far as the same shall not pollute or contaminate the purity of the water therein or unreasonably interfere with the use and enjoyment thereof by the town of Hudson aforesaid as a reservoir to supply the inhabitants of said town with pure water."

The petitioner contended "that by the diversion of the brooks his pasture and other land was wholly deprived of water, and that if the use of Gates Pond as a watering place for cattle should, in view of the fact that its waters were used for drinking and domestic purposes by the respondent, amount to a pollution or contamination of the purity of the water, and the petitioner, in consequence of such pollution, be shut off from watering his cattle there, the taking and diversion of the waters of the brooks was a very serious damage." It was in support of this contention that the evidence objected to was admitted and we think that it was rightly admitted.

The petitioner was entitled to have the jury take into account the damage done to his land for pasturing and other purposes by

the diversion of the waters of the brooks. As bearing upon that they necessarily would have to consider what other sources of water supply there were and their permanence and convenience or inconvenience as compared with those of which the petitioner was deprived by the taking. The questions objected to did not assume a right on the part of the petitioner to pollute the waters of Gates Pond but only directed the attention of the witnesses to the damages which the petitioner would sustain by the diversion of the waters of the brooks if he were deprived on the ground of alleged pollution of the right of access to the waters of Gates Pond. He would have no right to pollute the waters of the pond, but in the absence of statutory authority to that effect, or a reservation in its taking, the respondent would have no right to deprive him of access to the waters of the pond if he did pollute them.

The first ruling requested was that "the petitioner has the right to divert the waters of Joslin Brook for all legitimate purposes in connection with his farm." This plainly was too broad. Under it the jury might have found that the petitioner could divert the whole or the principal part of the waters of the brook, which, as against a lower riparian proprietor, which the town of Hudson was, he clearly could not do. *Moulton v. Newburyport Water Co.* 137 Mass. 163. The request was therefore rightly refused. The instructions of the court were full and correct.

The second ruling requested was that "the town of Hudson, under the evidence, has not taken the waters of Joslin Brook and cannot interfere with the particular riparian rights therein." This also was too broad. Joslin's Brook was a tributary of Fosgate Brook and lay partly within the land that was taken and flowed into Fosgate Brook within such land. The respondent took certain land described in its taking and also took "all the water, water rights and water supply, flowing to or from the premises above described," namely, the land taken. Manifestly therefore this request could not have been given in the form in which it was presented and was rightly refused.

The petitioner argued to the jury that "he was entitled to have them consider, in assessing his damages, the possibilities to which his estate might be put in the future; that is, possibilities for future development."

The respondent asked the court to instruct the jury: "The petitioner is not entitled to have damages assessed because of the possibilities of the future or a future development." The court, we think, rightly refused to give this request.

The petitioner was entitled to have all the damages assessed that were caused by the taking of his land, water and water rights. The damages were to be assessed as of the time of the taking. But in estimating them the jury were at liberty to take into account all the uses and capabilities to which it was then adapted or might be applied. *Teale v. Boston*, 165 Mass. 88, 92, 93. *Providence & Worcester Railroad v. Worcester*, 155 Mass. 35, 42. *Maynard v. Northampton*, 157 Mass. 218.

The possibilities of the land for future use at the time of the taking and the nature and purpose of such uses were therefore legitimate matters of inquiry and argument so far as they affected the present value.

Exceptions overruled.

BOSTON WOVEN HOSE AND RUBBER COMPANY vs. EDWARD KENDALL & others.

Middlesex. January 10, 1901. — March 2, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

A machine maker of established reputation who on an order from a manufacturer makes and delivers a machine to be used for a certain purpose, with a defect obvious upon inspection, is liable to such manufacturer for the amount of damages lawfully paid by him to his employees injured by an accident, caused by the negligence of such manufacturer in using the machine for the purpose for which it was ordered without a previous inspection.

A manufacturer of rubber goods ordered from a boiler maker of established reputation a boiler that would stand a working pressure of a hundred pounds, for the purpose of devulcanizing rubber by means of naphtha vapor. The boiler maker accepted the order and made and delivered a boiler, which was defective by reason of the construction of the hinge of its door, which prevented such door from being screwed tightly enough against the packing. The defect was patent and would have been discovered by inspection. The manufacturer without inspection proceeded to use the boiler for devulcanizing rubber, whereupon at a pressure of seventy-five pounds the packing blew out, allowing the naphtha vapor to escape and cause an explosion, in which several of the manufacturer's employees were injured. The manufacturer, on the ground that he was liable to his injured employees on account of his negligence in failing to inspect the boiler, paid them the damages to which they were entitled and sued the boiler

maker to recover the amount thus paid. *Held*, that on these facts a verdict for the plaintiff could be sustained, on the ground that the plaintiff's failure to inspect the boiler before using it was due to the warranty or representations of the defendant, the consequences of the false warranty being not too remote. Whether the injured workmen could have recovered against the boiler maker directly, and whether such liability of the defendant is a necessary condition of a recovery over, as by the plaintiff in this case, *quere*.

Where it was material to show, that the maker of a certain boiler was notified that it was to be used for experiments in a certain patented process to be conducted by the patentee, it was *held* that the letters patent could be introduced in evidence as a foundation for testimony of the patentee that he told the boiler maker of the use for which the boiler was wanted.

Upon the issue whether a certain explosion was caused by the defective construction of the hinge of the door of a boiler which prevented such door from being screwed tightly enough against the packing, *semble*, that it may be competent to show that experiments two or three months later with a similar boiler, and with all conditions similar except the hinge, did not result in an explosion.

CONTRACT OR TORT, with a count in each, to recover \$5,634.41 paid by the plaintiff to certain of its employees injured by an explosion of naphtha vapor caused by a defect in the door of a boiler made by the defendants. Writ dated October 21, 1898.

At the trial in the Superior Court, before *Sherman, J.*, it appeared, that the plaintiff was a manufacturer of rubber goods of all kinds in Cambridge, and that the defendants were manufacturers of boilers also in Cambridge; that the plaintiff ordered of the defendants an iron boiler known as a vulcanizer which would stand a working pressure of one hundred pounds to the square inch of surface; that the defendants accepted the order and undertook to manufacture the boiler in a good and workmanlike manner; that the defendants delivered the boiler, which the plaintiff accepted and set up on its premises.

The plaintiff's experts testified that the defect in the boiler consisted in the hinge of the door of the boiler being constructed in such a way that it prevented the door from pressing the packing tightly enough against the face of the boiler to withstand the internal pressure of seventy-five pounds, at which pressure the packing blew out and allowed the naphtha vapor to escape, and that such defect was a sufficient and adequate cause for the blowing out of the packing at a pressure of seventy-five pounds, and that the defect could have been remedied by enlarging the holes in the ears of the hinge or by using a smaller hinge pin.

It further appeared, that, in consequence of this defect, while the boiler was in use the naphtha vapor escaped and entered the boiler room and other parts of the plaintiff's premises and ignited and caused an explosion, whereby certain persons in the employ of the plaintiff were injured while in the exercise of due care; that the plaintiff, relying upon previous business experience with the defendants and on their general reputation as reliable manufacturers, failed and neglected to inspect the boiler before the explosion occurred, and failed and neglected to discover or remedy the defect, which the plaintiff could have discovered and remedied before the explosion occurred by the exercise of due care and diligence; that the plaintiff was under a legal obligation to compensate its employees; that it duly notified the defendants that it would hold them responsible; that it paid certain sums of money to its injured employees amounting in all to the sum sued for.

At the close of the evidence, the defendants asked for many instructions, which were refused by the judge, presenting the contentions of the defendants which are stated in the argument of their counsel.

The jury returned a verdict for the plaintiff for the full amount claimed; and the defendants alleged exceptions. These exceptions are stated in the opinion of the court.

A. Hemenway, (H. S. MacPherson with him,) for the defendants.

1. This is a case wherein the plaintiff seeks indemnity from the defendants for what the plaintiff was bound in law to pay, and did pay, as damages for the plaintiff's own negligence. *Nashua Iron & Steel Co. v. Worcester & Nashua Railroad*, 62 N. H. 159. *Old Colony Railroad v. Slavens*, 148 Mass. 363, 366, and cases there cited.

2. The plaintiff's own evidence shows that, notwithstanding the defendants' alleged negligence, the plaintiff, at and before the time of the accident, could have prevented the accident by ordinary care. *Holly v. Boston Gas Light Co.* 8 Gray, 123, 131. *Fletcher v. Boston & Maine Railroad*, 1 Allen, 9, 15.

3. Since, notwithstanding the defendants' negligence, the plaintiff, by ordinary care at the time of the accident, could have prevented the accident, the plaintiff's misconduct in not

so preventing the accident was the cause of the accident, and the plaintiff cannot recover from the defendants. *Nashua Iron & Steel Co. v. Worcester & Nashua Railroad*, 62 N. H. 159, and authorities cited therein.

4. The plaintiff's negligence in not discovering and remedying the patent defect is not excused in law by the alleged reliance upon the defendants, for the plaintiff was bound in law to use the due care, *i. e.*, ordinary care, which the plaintiff admits would have enabled it to discover and remedy the defect. The use of the boiler laden with naphtha gas under eighty pounds pressure, and without inspection to see that the contents were securely shut in, was a fault, a misfeasance, on the plaintiff's part, and prevents it from recovering for the defendants' prior negligence. *White v. Winnisimmet Co.* 7 Cush. 155, 160, 161. *Smith v. Smith*, 2 Pick. 621, 624. *Lucas v. New Bedford & Taunton Railroad*, 6 Gray, 64, 72, and cases there cited. *Clark v. Barrington*, 41 N. H. 44, which cites *Ingalls v. Bills*, 9 Met. 1. *Palmer v. Andover*, 2 Cush. 600, 604, 605, 610, and cases cited. *Tucker v. Henniker*, 41 N. H. 317.

5. As the plaintiff's evidence shows that ordinary care by the plaintiff would have prevented the explosion, the plaintiff cannot recover upon the contract of warranty the damages claimed. Sutherland, *Damages*, (2d ed.) § 88, and the authorities there given, amongst which is *Loker v. Damon*, 17 Pick. 284, relied upon by the court in *Dodd v. Jones*, 137 Mass. 322, and cases cited.

C. Reno, for the plaintiff.

HOLMES, C. J. This is an action to recover damages which the plaintiff had to pay to its employees for personal injuries caused by an explosion of a boiler made by the defendants. The facts may be stated in a few words. The defendants, who were first class boiler makers, undertook to make for the plaintiff a boiler which would stand a working pressure of one hundred pounds, and, on the plaintiff's testimony, understood that the boiler was to be used to contain naphtha vapor for experiments in devulcanizing india rubber. An experiment was tried, and, at a pressure of less than one hundred pounds, the naphtha vapor blew out the packing between the door and the end of the boiler by the side of the hinge, escaped into the air, ignited and caused

the damage for which the plaintiff had to pay. According to the plaintiff's evidence the accident was due to an improper construction of the hinge, which, by not having play enough, prevented that part of the door which was nearest to it from being pressed close to the boiler end by clamps which were used for that purpose.

At the trial the defendants asked many rulings and took many exceptions, but in the main they are condensed by the present argument in the general proposition that inasmuch as the plaintiff could not have been compelled to pay its workmen except on the ground that it had been wanting in due care, it cannot hold the defendants answerable for what would not have happened if the plaintiff had done its duty. The case is treated by the defendants' counsel as if it stood on the same footing as one where a plaintiff seeks to recover for personal injuries to himself to which his own negligence has contributed. But the judge allowed the plaintiff to recover a verdict on proving as it did to the satisfaction of the jury that it was liable for the damages which it paid, and also that although negligent as toward its servants it had shown all the care which the defendants had a right to expect.

We are fully aware of the difficulties in the way of holding a person liable for damage when the tort of another has intervened between his act and the result complained of. *Glynn v. Central Railroad*, 175 Mass. 510, 511, and cases cited. Nevertheless it is held by our decisions that in some cases of that sort there may be a recovery, and this seems to be recognized in the case upon which the defendants chiefly rely. *Nashua Iron & Steel Co. v. Worcester & Nashua Railroad*, 62 N. H. 159. The defendants, to bring themselves within the distinctions there taken, insist that we must assume that the plaintiff here might have prevented the accident by ordinary care, because it must have been held liable on the ground of a want of such care, and that, in such a case at least, it cannot make the defendants indemnify it.

We are of opinion that the plaintiff is entitled to hold its verdict, and that if indemnity ever is to be recovered, short of an express contract of insurance, for what is in form the result of a tort on the plaintiff's part, this case belongs to the class in which

it should be allowed. The plaintiff's misconduct consisted in a failure to discover by inspection a defect in an article specially made for it and probably not falling within the exceptional rule as to well known articles made by reputable makers and sold in the market ready for use. *Shea v. Wellington*, 163 Mass. 364, 369. Such a failure might make the plaintiff answerable to its men, but even if its conduct be called want of ordinary care, it was induced, as we must assume after the verdict, by the warranty or representations of the defendants. The very purpose of the warranty was that the boiler should be used in the plaintiff's works with reliance upon the defendants' judgment in a matter as to which the defendants were experts and the plaintiff presumably was not. Whether the false warranty be called a tort or a breach of contract the consequences which ensued must be taken to have been contemplated and was not too remote.

The fact that the reliance was not justified as toward the men does not do away with the fact that the defendants invited it with notice of what might be the consequences if it should be misplaced, and there is no policy of the law opposed to their being held to make their representations good. See St. 1894, c. 522, § 29. The New Hampshire decision is not against it, and there is an English case which went to the Court of Appeal which is very much in point. *Mowbray v. Merryweather*, [1895] 1 Q. B. 857, [1895] 2 Q. B. 640. It is intimated in that case that the workman himself could have recovered in the first place against the defendant. Whether that is a necessary condition of a recovery over we need not consider. See *Holyoke v. Hadley* Co. 174 Mass. 424, 428; *Consolidated Hand-Method Lasting Machine Co. v. Bradley*, 171 Mass. 127, 134. There are many cases in our own and other reports which offer as strong or stronger applications of the principle of liability over. *Gray v. Boston Gas Light Co.* 114 Mass. 149. *Churchill v. Holt*, 127 Mass. 165; *S. C.* 131 Mass. 67. *Old Colony Railroad v. Slavens*, 148 Mass. 363. *Holyoke v. Hadley Co.* 174 Mass. 424. *Washington Gas Light Co. v. District of Columbia*, 161 U. S. 316, 327, 328. *Oceanic Steam Navigation Co. v. Compania Transatlantica Espanola*, 134 N. Y. 461.

Two exceptions were taken to the admission of evidence. The first was to the admission of a patent for a process of devulcan-

izing india rubber by hot naphtha vapor under pressure, granted to Dr. Clark, for whose experiments the boiler was ordered. This laid a foundation for Clark's testimony that he notified the defendants of the use for which the boiler was wanted. The other exception was to letting in testimony that experiments two or three months later with a similar machine, and with all conditions similar except the hinge, did not result in an explosion. Evidence to the same point already had been let in before the exception was taken, and even if an exception properly were open we should hesitate to sustain it, considering that the result in some degree tended to confirm the theory that the construction of the hinge caused the trouble.

Exceptions overruled.

RICHARD C. WILLIAMS vs. MORRIS WEINBAUM & another.

Middlesex. January 11, 1901. — March 2, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

One having a written contract with a landowner, for lathing and plastering a certain building, executed an instrument which, after describing the contract, read as follows: This contract "I hereby transfer and assign to A. B., who will collect the payments according to the contract, and to whom all moneys are to be paid. And I do hereby constitute and appoint the said A. B. and his assigns to be my attorney irrevocable in the premises, to do and perform all acts, matters, and things touching the premises, in the like manner to all intents and purposes as I could if personally present." Below this instrument there was signed by the landowner the following assent: "I assent to above assignment and agree to pay A. B. according to contract." *Held*, that this instrument was not an assignment of the contract but merely an order or power of attorney to receive the payments under it.

One who has contracted with a landowner to furnish for a round sum labor and materials in the erection of a building, and has given to a third person an order to receive the payments under his contract, which has been accepted by the landowner, does not cease to have a debt due him from the landowner which entitles him to establish a mechanic's lien, since the money earned is due to him who performed the labor and furnished the materials, although he has ordered it paid to another.

PETITION to enforce a mechanic's lien brought by Richard C. Williams for the benefit of William K. Pinkham, for labor and

materials furnished by Williams under a contract with one Rudnick, filed December 30, 1899.

The case was defended by the respondent John P. Webber, a mortgagee of the land and building on which the lien was sought to be enforced.

At the trial in the Superior Court, before *Gaskill, J.*, it was admitted that the certificate was filed December 18, 1899, and that the description of the property therein contained was sufficient and the name of the owner correct. It was not disputed that the account was just and true, unless it was shown to be untrue by the following facts:

The labor mentioned was performed and furnished by the petitioner and men in his employ under a contract with Morris Rudnick of Boston, dated August 21, 1899, by which the petitioner agreed to furnish all the labor and materials for the lathing, wire lathing and plastering in the building numbered 770 on Massachusetts Avenue, in Cambridge, then belonging to Rudnick. In consideration of the performance of this agreement, Rudnick agreed to pay Williams \$1,525 in the following manner: \$700 when the house was all mortared, \$300 when the plaster was all skimmed, and the balance of \$525 thirty days after all the patching was done and the entire job was completed.

Thereafter, the following instrument was executed by Williams and delivered by him to Pinkham, and the assent thereon was signed by Rudnick:

"Boston, August 29, 1899. Mr. Morris Rudnick, Boston, Mass. Dear Sir: The written contract that I made with you for the lathing and plastering for the building situated in Cambridge, and numbered 770 on Massachusetts Avenue, the amount of which is fifteen hundred and twenty-five dollars (\$1,525.00), I hereby transfer and assign to William K. Pinkham, who will collect the payments according to the contract, and to whom all moneys are to be paid. And I, Richard C. Williams, do hereby constitute and appoint the said William K. Pinkham and his assigns to be my attorney irrevocable in the premises, to do and perform all acts, matters, and things touching the premises, in the like manner to all intents and purposes as I could if personally present. In witness whereof, I have set my hand and seal, this twenty-ninth day of August, 1899. R. C. Williams (*seal*). Signed, sealed and delivered in presence of Ella A. Taylor."

"Boston, Sept. 8, 1899. I assent to above assignment and agree to pay W. K. Pinkham according to contract. Morris Rudnick."

Thereafter Pinkham received the payments under the contract and paid the men other than the petitioner employed on the work. It did not appear in what capacity the payments were made and the money received, nor was there any further evidence bearing on the scope and effect of the assignment.

On this evidence, the respondent asked the judge to rule, that the account in the certificate was not just and true, since by virtue of the assignment and the memorandum annexed thereto the sum named was due not to Williams but to Pinkham.

The judge refused to rule as requested, and thereupon the respondent consented, subject to his exception to such refusal, that the jury might find that said account was just and true.

The respondent further requested the court to rule, that the assignment operated as matter of law to terminate the petitioner's lien, but the court refused so to rule, and upon the petitioner's motion, after the jury had answered the issues, ordered the lien established; and the respondent Webber alleged exceptions.

C. M. Hemenway, for the respondent Webber.

E. F. McClennen, for the petitioner.

MORTON, J. This is a petition to enforce a mechanic's lien for labor, and is defended by the mortgagee alone. It is admitted that the labor for which a lien is claimed by the petitioner was performed and furnished by him under his contract with Rudnick. The mortgagee contends that the petitioner is not entitled to a lien, because there was nothing due him when he filed the certificate of lien. His contention is, in substance, that the petitioner assigned the contract to Pinkham; that Rudnick assented and agreed to the assignment; that the petitioner ceased to have any interest in the contract; and that what became due under it was due to Pinkham and not to the petitioner; and therefore the statement by the petitioner in the certificate of lien that the account was a just and true account of the amount due him for labor and materials performed and furnished by him was not true. We think that this contention proceeds upon an erroneous view of the effect of the so called assignment. It seems to us that that was in effect merely an

order or power of attorney given by the petitioner to Pinkham, and assented and agreed to by Rudnick, authorizing the latter to pay to Pinkham and authorizing Pinkham to receive what should thereafter become due under the contract. There was not in any just sense a novation. There is no suggestion in the so called assignment as there was in the assignment in the case of *Derby v. Sanford*, 9 Cush. 263, that Pinkham was to undertake the work, and he did not undertake it. On the contrary, the petitioner performed and furnished the labor and materials required by the contract, and could have been compelled, we think, by Rudnick to do so, or to respond in damages. It would be going far, it seems to us, to say on what appears in these exceptions and nothing more, that Rudnick released the petitioner and agreed to look to Pinkham for the performance of the contract, and that Pinkham agreed to perform and furnish the labor and materials required. The contract not having been assigned, the request by the respondent based on the fact that it was assigned was rightly refused.

The respondent contends, further, that there was no debt due to the petitioner. It is no doubt true that to support the lien there must be a debt due to the petitioner. But in case of refusal on the part of Rudnick to pay according to the terms of the order, an action could be brought by the petitioner in his own name for the benefit of Pinkham, and in a just and true sense, therefore, the balance due for labor could be said to be due to the petitioner notwithstanding it was payable according to the terms of the order to Pinkham. It would be strange if a party who had contracted with another to furnish labor and material for a round sum in the erection of a house and who had given an order to a third person which had been accepted by the owner of the house should be held to have lost thereby his right to a lien. The party receiving the order would have no right to a lien because he did not furnish the labor and material, and the result would be that no one would be entitled to a lien. No case has been called to our attention in which such a rule has been laid down.

Exceptions overruled.

ANTONIO BARTOLOMEO vs. JOHN H. McKNIGHT.

Suffolk. January 14, 1901. — March 2, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Where the nature of the soil and the shape and depth of a trench are such as to require shoring, it is negligence on the part of an employer to put a laborer at work in the trench with its sides unsupported and without providing material for shoring it.

A laborer who has had considerable experience in working in trenches and laying pipes therein, when ordered into a trench to lay a pipe, is not bound to inspect the sides of the trench before going to work, and in an action for injuries caused to such a workman by the caving in of the side of the trench, it is a question for the jury whether he was in the exercise of due care.

In an action for injuries caused by the caving in of the side of a trench in which the plaintiff was working, where the negligence of the defendant's superintendent is in issue, the fact that the superintendent's attention was called to the danger of the trench and the need of shoring it, may be shown by evidence of statements made to him by a third person; and where the person making the statements worked in the same trench earlier on the same day, he may be allowed to state what precautions he took for his own safety, this having a bearing on the dangerous character of the trench, and also being admissible to rebut any inference prejudicial to his testimony that might be drawn from his conduct in going into the trench to work.

TORT, with counts both at common law and under the employers' liability act, to recover damages for personal injuries sustained by the plaintiff while employed by the defendant in laying a water pipe in a trench dug by the defendant in Washington Avenue in Chelsea. Writ dated January 15, 1898.

At the trial in the Superior Court, before *Richardson, J.*, the plaintiff testified that he was born in Italy and would be twenty-three years old in October, 1899; that before working for the defendant he had worked in trenches for pipes; that he had been digging bell holes,* laying pipes and doing that kind of labor about two months before he worked for the defendant; that while working for the defendant he laid pipes but did no

* The flare at the end of each section of pipe where it fits over the next section is called the bell, and in digging trenches for water pipes an enlargement is made on each side of the trench at intervals of twelve feet where the sections of pipe are joined. These enlargements are called bell holes.

digging, with the exception of "working around digging some rocks," and that most of the time he laid pipes.

On the day of the accident the plaintiff was put to work by a foreman of the defendant called "Jimmy." His injuries were caused by the caving in of the side of the trench in which he was working. The plaintiff described the happening of the accident as follows: "I laid three pieces of pipe before the accident. The accident occurred about fifteen minutes of six. Jimmy was right on top of the ground. He was to help me to set the three pieces of pipe. He told me to clean some loose stuff from under the pipe and then went on top of the ground. Before the accident I did not know there was any danger of the trench caving in. I saw the defendant around the morning of the accident, not near the place of accident but way up ahead. The trench was not straight where the accident happened, but bent. I talked with the defendant about four or five hundred feet away from the place where the accident happened. The trench at the point where the accident happened was about twenty-five or thirty feet long. I used boards or planks to put under the pipe to keep the pipe straight and level. There was no bracing at the place of accident, nor planks nor anything of that kind, except planking or boarding that was used for putting under the pipes. Five or six pieces of board were put under each pipe. When the accident happened I was laying pipe, standing bent over crossways the trench. I was cleaning out some loose stuff from the bell hole. My right hand was towards Donato; my face was on the side of the trench. Jimmy, the foreman, was a little on my left side on top of the trench. I do not know how much of the bank came down. Some came on my back."

He further testified as follows: "Where the accident happened the trench was six feet deep and about three feet wide at the top, and the same at the bottom. It did not slope. . . . I was not using my pick at all when the accident occurred. . . . I was cleaning the bell hole at the end of the third piece of pipe when the accident happened. There was no one at work there with me when the bank fell."

One Frank E. Beedy, a foreman of the Chelsea Gas Light Company, testified that the soil in which the trench was dug was sand, clay and gravel mixed and was very apt to cave in; that

other ditches had been dug through there, and the effect of digging over and re-laying the material was to get the soil mixed so that it would be softer and not solid.

Subject to the defendant's exception, this witness was allowed to state the following conversation: "I told Jimmy that the bank should be braced up, that it would cave in. And he told me, 'That is all right; I have worked in places like this before,' and that is all he said, and walked away. This was after dinner on the day of the accident."

The same witness further testified: "I saw no means of shoring or protecting the trench, there were none visible. . . . In my opinion this trench, unshored and unbraced, was not a safe place. It was a bad corner. That angle in the corner ought to have been braced any way. It rained the night before; it was very bad soil to cave in. Rain affects the soil. Where the water ran down the hill, it ran into this ditch and soaked away the dirt underneath and made it cave in more or less. Material that was thrown out would make it cave more from its own weight."

The witness further testified that earlier on the same day he was working in the same trench on a pipe of the gas company, and, against the objection and exception of the defendant, the plaintiff was allowed to ask the witness what other precautions he took besides speaking to Jimmy before going into the trench. The witness answered: "I told this man that was working for me to watch the bank very carefully, and if it started to cave in, to holler to me, so that I could get out of the way." And in answer to a further question as to what the man did in consequence, he said: "He stood up on top of the bank and watched it right there for me."

This witness further testified, that it was "not good or safe workmanship to make a straight slope in a trench that is six feet in depth."

Another witness for the plaintiff, one Kelly, superintendent of the Chelsea gasworks, testified that he called Jimmy's attention to the condition of the bank, said to him that it was an unsafe ditch, and told him the ditch ought to be braced up, and that the gas pipe surely should be looked after.

Another witness, one Dolan, a laborer at work for the Chelsea gasworks under Beedy, testified, that he heard the conversation

between Jimmy and Beedy above stated, and, subject to the defendant's exception, stated: "I was down in the ditch with him [Jimmy] and I said 'Frank [Beedy], it is a dangerous place.' Frank went down and told him it was an unsafe ditch to work in. He said, 'We have worked in worse places than that.' That is all that was said at the time."

To the admission of the testimony of the several witnesses above stated the defendant excepted.

At the close of the evidence, the defendant requested the judge to rule that upon all the evidence the action could not be maintained. This ruling was refused and the defendant excepted. In submitting the case to the jury, the judge put to them the following question: "If the jury find that the defendant is liable to the plaintiff, I desire that the jury state whether they find such liability on the common law counts, that is, the first or second or fifth counts, or on the third or fourth counts, under the employers' liability act."

The jury returned a verdict for the plaintiff, and to the above question answered: "Common law counts"; and the defendant alleged exceptions.

G. W. Buck, for the defendant, submitted the case on a brief.

J. W. Corcoran, (*C. W. Ford* with him,) for the plaintiff.

MORTON, J. This is an action to recover for personal injuries sustained by the plaintiff while in the defendant's employ as a laborer engaged in laying water pipes in a trench dug by the defendant in Washington Avenue, Chelsea. The accident was caused by the caving in of the side of the trench. There are counts at common law and counts under the employers' liability act alleging negligence of a superintendent. At the conclusion of all of the evidence the defendant asked the court to direct a verdict for him. The court declined to do so. There was a verdict for the plaintiff on the common law counts, and the case is here on the defendant's exceptions to the refusal of the court to direct a verdict for him and to the admission of certain evidence.

We think that there clearly was evidence of negligence on the part of the defendant in setting the plaintiff to work in an unsafe and dangerous place. The trench in which the plaintiff was at work was unshored and unsupported. There was evidence tending to show that no material for shoring or bracing was fur-

nished by the defendant. There was also evidence tending to show that the nature of the soil through which the trench was dug, and the depth of the trench and the manner in which it was dug, were such as to render the sides of the trench liable to fall and dangerous, and that the defendant was on the spot and had an opportunity to observe the condition of the trench. It was his duty to see that the place where the plaintiff was set to work was reasonably safe or that suitable material was provided for making it so. *Norton v. New Bedford*, 166 Mass. 48. *Coan v. Marlborough*, 164 Mass. 206. *Hennessey v. Boston*, 161 Mass. 502. There was evidence warranting the jury in finding that he failed in the performance of this duty and that the plaintiff was injured in consequence of such failure.

The defendant further contends that the plaintiff was not in the exercise of due care. From the plaintiff's testimony it is evident that he had had considerable experience in working in trenches and laying pipes for the defendant and others in various places. He was bound to exercise a reasonable degree of vigilance in regard to the safety of the place where he was working. But he was not bound to inspect the sides of the trench before going to work. He testified that before the accident he did not know that there was any danger of the trench caving in. He was an ordinary laborer bound to follow the directions of the defendant and his foreman. He had a right to rely to some extent on the assumption that they would take proper measures for his safety and would not put him to work in a dangerous place. The extent to which under the circumstances of the case he might properly rely on them, and whether he was in the exercise of due care were questions for the jury. *Norton v. New Bedford*, *Coan v. Marlborough*, and *Hennessey v. Boston*, *ubi supra*. *Lynch v. Allyn*, 160 Mass. 248. It was for them to give such weight to his own testimony and to the testimony of such other witnesses, if any, as tended to impeach it, as they thought it was entitled to.

The remaining exceptions relate to evidence of what was said to the defendant's foreman and in his presence of the dangerous character of the trench and the need of bracing. We think that it was rightly admitted. The case was tried on counts under the employers' liability act alleging negligence on the part

of a superintendent or of one exercising superintendence as well as under counts at common law. The fact that the foreman's attention was called to the danger of the trench and the need of bracing seem to us to have been clearly competent on the question of negligence on his part. The precautions which the witness Beedy took for his own safety were admissible as bearing on the dangerous character of the trench. Moreover, it was admissible to rebut any inference which might be drawn prejudicial to his testimony from the conduct of the witness in going down into the trench.

Exceptions overruled.

ANNIE HOSEASON vs. JOHN KEEGEN.

Suffolk. January 14, 1901. — March 2, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

A bill in equity by an executrix, seeking a reconveyance of certain real estate conveyed to the defendant by the plaintiff's testatrix, alleged that, such testatrix being unable to write her name, the defendant induced her to affix her mark to a deed of the property in question by a representation that it was a merely formal matter, saying to her "I want you to sign this paper. It does n't amount to anything," and that the plaintiff's testatrix executed the instrument, believing that by so doing she was not conveying away any right in her property. After a hearing on the merits, the bill was dismissed by a final decree not appealed from. Subsequently, by a second bill in equity, the same plaintiff sought from the same defendant a reconveyance of the same property, alleging that the plaintiff's testatrix, being seventy years of age, unable to read or write and of failing mind, formerly lived with the defendant, the husband of her daughter since deceased, that after her daughter's death the plaintiff's testatrix determined to live with the plaintiff, and that thereupon the defendant by his inducement, persuasion and undue influence procured her assent to the conveyance of the property to him without consideration, and that the conveyance was not the free act of the plaintiff's testatrix but was the will and act of the defendant. To this second bill the defendant pleaded *res judicata*, setting up the decree dismissing the plaintiff's first bill. *Held*, that the plea was good and the decree a bar to the plaintiff's second bill; that the two bills were generically for the same alleged grievance, namely, that the plaintiff's testatrix was given by the defendant an improperly created motive for making the conveyance to him, and differed only in the statement of the motive, and the plaintiff was bound to bring forward in support of her first bill all the matters stated in her second bill.

BILL IN EQUITY by the executrix and sole devisee under the will of Mary McLaughlin against the widower of said Mary's

deceased daughter, to set aside a conveyance of certain real estate from said Mary to the defendant, alleged to have been procured by him through undue influence and persuasion and not to have been the free act of said Mary, praying the court to order a conveyance of the property to the plaintiff, filed January 9, 1900.

The defendant set up a plea of *res judicata*, alleging that Mary McLaughlin, the plaintiff's testatrix, on May 12, 1897, filed a bill, which after the death of said Mary was prosecuted by the plaintiff, for the recovery of the same rights, alleging the same facts and seeking the same relief as the present bill; that said former bill after a hearing on its merits in the Superior Court had been dismissed with costs by a final decree and that no appeal was taken from said decree.

The third and fourth paragraphs of the present bill setting forth the grounds on which relief was sought, were as follows :

"Third. And the plaintiff further says that the said Mary McLaughlin was a woman well advanced in years, being seventy years of age on the said third day of February, 1896, and that she was a woman of little education, unable to read or write at the time of the conveyance referred to; that her mind and memory had begun to fail her, owing to advancing years, and that she was readily susceptible to the influence of those with whom she came in contact.

"Fourth. And the plaintiff says that said Mary McLaughlin was the mother-in-law of said Keegen; that she lived with him and his wife, who was her daughter, for a period of fourteen years next prior to said February, 1896; that the wife of the defendant, the daughter of said Mary McLaughlin, died some time in August, 1895, and that the said Mary McLaughlin at some time thereafter decided to live with the plaintiff, Annie Hoseason, and that as soon as the said Keegen knew of such intention, he determined to secure a conveyance of the property hereinbefore referred to; that by reason of his inducement, persuasion and influence unduly exercised upon the said Mary McLaughlin, he procured the assent of the said Mary McLaughlin to convey to him said property without consideration; and the plaintiff says that the said deed was not the free act of said Mary McLaughlin, but was the will and act of the said John Keegen."

The second paragraph of the former bill, which the plaintiff contended did not raise the same issues, was as follows:

"Second. That on said third day of February, A. D. 1896, the defendant John Keegen produced to the plaintiff a written instrument which the said Keegen then and there requested the plaintiff to place her mark upon, the plaintiff being unable to write her name as her signature to such instrument. And the plaintiff says that the defendant represented to the plaintiff as the reason why she should so affix her mark as her signature to such instrument, and as an inducement for her so to do, that said instrument was a mere formal matter, and was of no particular consequence. The words spoken by the defendant being substantially as follows: 'I want you to sign this paper. It does n't amount to anything.' And the plaintiff, believing the representations made by the defendant to be true, thereby being induced so to do, and believing that by so doing she was not conveying away any right in her property, executed the said instrument by affixing her mark, as her signature to said instrument."

The Superior Court, after hearing, sustained the plea and ordered the bill dismissed with costs. From this decree the plaintiff appealed.

J. H. Vahey & C. H. Innes, for the plaintiff, contended, that the decree dismissing the former bill might have been made on the ground, that the defendant had not misrepresented to Mary McLaughlin the character of the instrument which she signed, and did not preclude the issue, whether or not she had been induced to sign by the undue influence of the defendant without such misrepresentation.

P. Mansfield, for the defendant.

HOLMES, C. J. This is a bill in equity seeking to compel a conveyance of certain land from the defendant to the plaintiff on the ground that the defendant obtained the conveyance to himself without consideration by undue influence exercised over one Mary McLaughlin, the owner, of whom the plaintiff is the executrix and residuary devisee. The defendant pleads a former adjudication upon a bill, brought by Mary McLaughlin and carried on by the present plaintiff after Mary McLaughlin's death, in which it was alleged that the defendant obtained the same

deed by a fraudulent statement that it did not amount to anything, Mary McLaughlin being unable to read it, in which it was prayed that the defendant be ordered to release any interest conveyed by the same. This former bill, it is alleged, was dismissed on the merits. The Superior Court sustained the foregoing plea and dismissed the present bill. The plaintiff appeals.

We are of opinion that the decree of the Superior Court was right. The object and "petitory conclusions" of both suits are the same: to annul the effects of the same deed by a reconveyance. *Gillespie v. Russel*, 3 Macq. 757, 760. It is true that the ground on which the reconveyance now is sought differs somewhat from that formerly alleged. But, so far as appears, both bills go on generically the same footing, that Mary McLaughlin was given an improperly created motive for action by the defendant, and differ only as to what the motive was. It does not appear that the fraudulent statement alleged in the first bill went to the nature and identity of the instrument so as to raise a question whether Mary McLaughlin might not have denied it to be her deed; *O'Donnell v. Clinton*, 145 Mass. 461, 462, 463; on the contrary the statement on its face, as set forth, dealt only with the importance of the transaction, a consideration which could affect only motives. The undue influence alleged in the present bill of course concerns motives alone. *Fairbanks v. Snow*, 145 Mass. 153, 154.

Again it does not appear that the plaintiff did not have all the knowledge at the time of bringing her former bill that she now has. If she had, we should hesitate to admit that she would not have been barred even if the former bill had distinctly alleged a misrepresentation as to the nature of the instrument which Mary McLaughlin signed, and thus had alleged what in Scotland would be called a different *medium concludendi*. If the two grounds then should be regarded as inconsistent, there might be a question as to the propriety of allowing a plaintiff to speculate upon alternative and irreconcilable statements of fact. If they still would be consistent the plaintiff properly might be held bound to bring forward all her grounds of attack at once. See *Wildman v. Wildman*, 70 Conn. 700, 710. But see *Phosphate Sewage Co. v. Molleson*, 5 Ct. of Sess. Cas.

(4th ser.) 1125, 1139. But however it might be in the different case supposed, we think it entirely plain on the case as it stands and as we have stated it, that the plaintiff was bound to bring forward in the former case all grounds of a similar nature, or, in other words, all matters of improperly created motive which she might have for setting aside this deed. *Phosphate Sewage Co. v. Molleson*, 4 App. Cas. 801. *Henderson v. Henderson*, 3 Hare, 100, 115. *Werlein v. New Orleans*, 177 U. S. 390. *Sayers v. Auditor General*, 124 Mich. 259. *Foster v. Hinson*, 76 Iowa, 714, 720. *State v. Brown*, 64 Md. 199. *Boyd v. Boyd*, 53 App. Div. (N. Y.) 152, 159.

Decree affirmed.

DANIEL DONAHUE vs. BOSTON AND MAINE RAILROAD.

Suffolk. January 14, 15, 1901. — March 2, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

A freight brakeman employed as a switchman, injured while attempting to get on a moving engine in the course of his duty, and falling by reason of a pile of stones lying near the track, from one and a half to three feet high and only ten feet from one of the switches which it was his duty to operate, may be found to be in the exercise of due care, although he had not noticed the pile of stones, which had been there for several months, or, if he had noticed it, forgot it at the moment.

It is the duty of a railroad company to exercise reasonable care to keep its tracks in a safe condition for its employees to work upon.

A railroad company that suffers a pile of stones varying in size from a man's hand to a man's body, the pile being from one and a half to three feet high, to remain for several months within from eighteen to twenty-four inches of one of its tracks, may be found to be negligent in failing to provide a safe place in which to work for a switchman in its employ, whose duties require him to get upon a moving engine, and who in doing so is injured by reason of such pile of stones.

The existence of an irregular pile of stones, suffered to remain near a track of a railroad company for several months, is not a risk of employment which a freight brakeman employed as switchman assumes.

If a pile of stones suffered to remain near a track of a railroad company was one of many similar piles substantially the same distance from the rails on that and other tracks, where a switchman's duties called him, *semble*, that such switchman might be held to assume the risk of injury from the pile of stones. Per MORTON, J.

TORT, with counts both at common law and under the employers' liability act, by a freight brakeman of the defendant working as a switchman, to recover for injuries caused by his losing his hold and falling by reason of a pile of stones lying near the track of the defendant, when the plaintiff was attempting to get upon a moving engine in the course of his duty. Writ dated July 15, 1898.

At the trial in the Superior Court, before *Blodgett, J.*, there was evidence that the plaintiff was twenty-eight years of age; that he worked for the defendant company as freight brakeman during the years 1896, 1897 and 1898, about one year and a half of service in all; that at the time of the accident, January 14, 1898, he was a member of a certain switching gang and of such gang was the one most commonly called upon to throw the switches. He was in fact called the switchman.

It appeared, that in the Lowell yard of the defendant company there was a track which ran from the Lowell Bleachery; that in order to go from the Bleachery track to track number three where the engine was to go for the purpose of hauling out certain cars, it was necessary to throw two switches. These two switches were about eighty feet apart; that just before the engine reached the first of the two switches it stopped; that the plaintiff went ahead and threw the first of the two switches; that he then walked ahead to the second switch which he also threw, so that the engine could go down on track number three.

The plaintiff testified that after he threw the second of the two switches he walked back to meet the engine; that he walked probably ten or twelve feet from the switch towards the engine, and as the engine came along took hold of the grab iron of the tender, the engine then being on track two; that the engine was then backing down and not going head on; that he took hold of the grab iron of the tender, and just as he went to get on to the engine it suddenly started and he lost his footing; that he tried to follow along and grabbed hold of the handle of the cab, and tried to get upon the engine, but every time he got his footing he would lose it, and he got down to a pile of rocks that was ten feet from the switch, that is, north of the switch, and he fell over them and his arm went out under the wheel of the engine; that the engine, at the time that he first attempted to

put his hand upon the grab iron, was going at just about a smart walk, at such a rate of speed that any one could step upon it, probably about four miles an hour; that during the time that he was trying to get upon the engine, it was going double speed, that is, that it was going eight or ten miles an hour. The defendant's counsel agreed that the plaintiff was expected to get upon the moving engine, and that it was a part of his duty to do so.

The plaintiff also testified that the pile of rocks caused him to fall, that he tripped over them, and that he lost his grip on the grab iron when he struck the pile of rocks. All other material facts are stated in the opinion of the court.

The defendant asked for certain rulings which were refused by the judge. The jury returned a verdict for the plaintiff in the sum of \$6,500; and the defendant alleged exceptions, which, *Blodgett, J.*, having resigned, were allowed by *Aiken, J.* The questions raised by the exceptions are stated in the opinion of the court.

W. I. Badger, (*S. Robinson* with him,) for the defendant.

S. A. Fuller, (*C. H. Blood* with him,) for the plaintiff.

MORTON, J. This is an action to recover for personal injuries sustained by the plaintiff while in the defendant's employ in attempting in the course of his duty to get on a moving engine. The accident was caused, or might have been found to be caused, by a pile of rocks which, it was alleged, was in dangerous proximity to the track and which caused the plaintiff to lose his hold and to fall and receive the injuries complained of. The declaration contained three counts. At the close of all of the evidence the third count was withdrawn by the plaintiff at the suggestion of the court. The first count was at common law for not providing the plaintiff a safe place in which to do his work. The second count was under the employers' liability act for negligence on the part of a person in the service of the defendant and in charge of a locomotive engine, in suddenly increasing the speed of the engine while the plaintiff was attempting to get on it. The jury found, in answer to a question put by the court, that the plaintiff was not injured in that manner. The defendant requested various rulings, but the case resolves itself into three questions, and in effect has been so argued by the

defendant:— 1st. Was the plaintiff in the exercise of due care? 2d. Was the defendant negligent in providing the plaintiff with a safe place to work in? 3d. Did the plaintiff assume the risk?

1. The defendant contends that the plaintiff was not in the exercise of due care in attempting to board the engine when he did. It admits that in the course of his duty he was required to get on the engine while in motion, but it says that he should have got on upon the opposite side or on the front or rear of it. The plaintiff testified that the place where he attempted to get on was the place where he had been in the habit of getting on, and that he got on there because he thought it was the safest place. He gave his reasons for not getting on or trying to get on at the other places. The jury took a view. It was for them to say, we think, whether the plaintiff was or was not in the exercise of due care in attempting to get on where he did. There were conflicting considerations and testimony and it was for them to say what weight they were entitled to. It could not be ruled as matter of law that he was not in the exercise of due care. The fact that he had not noticed the pile of stones, or that if he had noticed it he forgot it at the moment, was not conclusive on the question of due care. *Snow v. Housatonic Railroad*, 8 Allen, 441.

2. Was the defendant negligent in not providing him with a safe place in which to work? There was testimony tending to show that there was a pile of stones from eighteen to twenty-four inches from the track a short distance from one of the switches which it was the defendant's duty in the course of his business to throw; that the stones varied in size from a man's fist to a man's body, and that the pile was from one and a half to three feet high, and had been there several months and was rough and uneven and looked as if the stones had been thrown there some time when the track was being fixed. It was the duty of the defendant to exercise reasonable care to keep its tracks in a safe condition for its employees to work upon, and we think that there was evidence for the jury of negligence in that regard on its part. *Babcock v. Old Colony Railroad*, 150 Mass. 467. One of the defendant's witnesses testified that "they [the stones] were in a dangerous place; . . . they were

in a man's way; it was a bad place for stones to be, too near the rail."

3. The remaining question is whether the plaintiff assumed the risk. The plaintiff testified that he had not noticed the stones. The court, amongst other things, instructed the jury that if the plaintiff knew or in the exercise of reasonable care should have known that the stones were at or near the switch and was injured by them he could not recover. This was more favorable to the defendant than it was entitled to. The jury must have found that the plaintiff did not know, or in the exercise of reasonable care was not bound to know that the stones were there. It may be that the weight of the evidence showed that he knew or ought to have known that the stones were there. But under these and other instructions in which the attention of the jury was directed to the matter they settled the question the other way. The defendant contends however that, even if the plaintiff did not know that the stones were there, the risk was an obvious one which he must be held to have assumed. *Lovejoy v. Boston & Lowell Railroad*, 125 Mass. 79. *Goldthwait v. Haverhill & Groveland Street Railway*, 160 Mass. 554. *Thain v. Old Colony Railroad*, 161 Mass. 353. If the pile of stones had been one of many similar piles substantially the same distance from the rails on this and other tracks where the plaintiff's duties had taken him, it may be that he would be held to have assumed the risk. *Lovejoy v. Boston & Lowell Railroad* and *Thain v. Old Colony Railroad*, *ubi supra*. But no other pile of stones, and no structure as near the track as this pile of stones was, is shown to have existed in those portions of the defendant's premises where the plaintiff's duties required him to go. It is not absolutely incredible that a person, employed as the plaintiff was, should not have observed the stones and still should have been in the exercise of due care. We do not think that such conduct would be necessarily inconsistent with the ordinary habits of observation of such persons. It would be going far to say that a pile of stones like this constituted a part of the ways, works and machinery of the defendant. They were thrown out, as there was evidence tending to show, while the road was being repaired, and apparently were suffered to remain there as a matter of inattention and neglect with the possibility that they

might be removed at any time. They certainly could not be said to constitute a part of the permanent ways, works and machinery. *McGiffin v. Palmer's Shipbuilding & Iron Co.* 10 Q. B. D. 5. It seems to us that the case is governed by *Babcock v. Old Colony Railroad*, *ubi supra*.

Exceptions overruled.

FRANKLIN C. ELDRIDGE & others vs. CHARLES McDERMOTT.

Barnstable. January 15, 1901. — March 2, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Section 21 of Pub. Sts. c. 60, requires oats to be sold by the bushel. Section 22 of the same chapter requires a bushel of oats to be thirty-two pounds. *Held*, that a sale of oats by the bag under a custom requiring each bag to contain two bushels of thirty-two pounds each was a valid sale. *Eaton v. Kegan*, 114 Mass. 488, distinguished.

In an action for the price of oats sold "by the bag," evidence is admissible, of a usage of trade by which the term "bag of oats" means sixty-four pounds of oats, not including the bag, or two bushels of oats of thirty-two pounds each.

CONTRACT to recover \$670.70 for goods sold, of which \$338.25 was for the price of oats sold and delivered in bags. Writ dated October 31, 1898.

At the trial in the Superior Court, before *Sherman, J.*, without a jury, the plaintiffs put in an auditor's report and rested. The defendant did not offer any evidence, and it was agreed that the auditor's report should be taken as an agreed statement of facts.

The judge found for the plaintiffs in the sum of \$751.18, being the amount found due by the auditor with interest thereon since the date of the writ, and reported the case for the consideration of this court. If the finding was not authorized, then judgment was to be entered for the plaintiffs for the sum of \$332.45, with interest from the date of the writ, or such judgment was to be entered as law and justice might require.

The auditor's report was as follows:

"I find that Franklin C. Eldridge, one of the partners of the firm of Eldridge & Keene, the plaintiffs, and the defendant made

an oral contract some time in March, 1898, whereby the plaintiffs agreed to sell and deliver to the defendant oats by the bag, corn by the bushel and hay by the ton, in such quantities as the defendant should order from time to time, at current rates; and that the plaintiffs sold and delivered the merchandise as set forth in their declaration under said contract; that the oats were charged by the plaintiffs on their books by the bag; that the total charge to the defendant amounted to \$670.70; that of this amount \$338.25 was for oats sold and delivered under said contract, and that the prices therein charged were current rates at the time of said sales.

"I find further, under testimony which was objected to by the defendant, but which was admitted *de bene*, that by a usage in the trade among grain dealers, the term 'bag of oats' means two bushels of thirty-two pounds each; that the defendant understood, when he made the contract that a bag of oats meant sixty-four pounds of oats, not including the bag, and that that is what he understood he was to receive of the plaintiffs under the terms of the contract with them; that the plaintiffs had the same understanding of the contract. I find further that the plaintiffs had a greater part of their oats shipped to them in bulk; that they weighed and bagged them at their store, putting sixty-four pounds in each bag; that the oats they had had consigned to them in bags were not weighed by them, but were weighed by their consignors, and that each bag contained sixty-four pounds of oats, and that each bag of oats delivered to the defendant by the plaintiffs was either weighed by the plaintiffs or by their consignors, and contained sixty-four pounds of oats.

"If under the foregoing statement of facts the plaintiffs are entitled to recover the price of the oats delivered, I find for the plaintiffs in the sum of \$670.70, the amount claimed in their declaration, with interest from the date of the writ. Otherwise, I find for the plaintiffs in the sum of \$332.45, for the other items specified in their declaration, with interest from the date of the writ."

Pub. St. c. 60, §§ 21 and 22, relating to grain and meal, are as follows:

"Sect. 21. In all contracts for the sale and delivery of wheat, corn, rye, oats, barley, buckwheat, cracked corn, ground corn or

corn meal, ground rye or rye meal, or feed, or any other meal except oatmeal, the same shall, except as provided in chapter sixty-six, be bargained for and sold either by the bushel or by the cental.

"Sect. 22. A bushel of wheat shall be sixty pounds avoirdupois; a bushel of corn or rye, fifty-six pounds; a bushel of oats, thirty-two pounds; a bushel of barley or buckwheat, forty-eight pounds; a bushel of cracked corn, corn meal, rye meal, or feed, or any other meal except oatmeal, fifty pounds; and a cental, one hundred pounds."

T. C. Day, for the defendant.

H. P. Harriman, (*M. C. Waterhouse* with him,) for the plaintiffs.

MORTON, J. The only matter now at issue in this case is the plaintiffs' right to recover for the oats. The case was sent to an auditor and, at the hearing in the Superior Court, it was agreed that his report should be taken as an agreed statement of facts. It appears from the report that there was an oral contract between the plaintiffs and the defendant by which the plaintiffs were to sell and deliver to the defendant oats by the bag, hay by the ton, and corn by the bushel at current rates in such quantities as the defendant should order from time to time. The oats were delivered under the contract, and were charged to the defendant by the plaintiffs on their books by the bag at the current rates. The auditor found if it was admissible that according to a trade usage amongst grain dealers the term "bag of oats" meant two bushels of thirty-two pounds each, and that the defendant understood when he made the contract that a bag of oats meant sixty-four pounds of oats, not including the bag, and that that was what he was to receive from the plaintiffs. The plaintiffs understood the same. The auditor also found that the plaintiffs had the greater part of the oats shipped to them in bulk and weighed and bagged them at their store putting sixty-four pounds in each bag; that oats consigned to them by the bag were weighed by the consignors, and each bag contained sixty-four pounds; and that each bag delivered to the defendant was either weighed by the plaintiffs or their consignors and contained sixty-four pounds.

The defendant contends that there was not a sale by the bushel as required by Pub. Sts. c. 60, § 21, and that the evi-

dence of usage was inadmissible, and he relies upon *Eaton v. Kegan*, 114 Mass. 433.

1. If, when parties have contracted orally as one of the terms of the contract to sell oats by the bag, such a sale is to be regarded under any and all circumstances as a sale in violation of the statute, then, it is clear that the evidence of usage was inadmissible, since evidence of usage cannot be shown to justify an illegal sale. But we do not think that the rule can be laid down so broadly. Notwithstanding the form of the phrase, we think that it would be open to the parties to show, if they could, by any competent evidence that the sale was in fact a sale by the bushel. We think therefore that the evidence of usage was rightly admitted. See *Page v. Cole*, 120 Mass. 37; *Mooney v. Howard Ins. Co.* 138 Mass. 375.

2. The question then is whether, in view of the usage and of what was done in weighing and delivering the oats, the sale is to be regarded as a sale by the bag merely, or as a sale by the bag of two bushels in a bag, in which case we think that it would be in effect a sale by the bushel. The usage shows and the auditor has found that when the parties were contracting they understood that they were contracting for bags of oats containing sixty-four pounds or two bushels of thirty-two pounds each. The auditor has also found that there was weighed and put into each bag that was delivered sixty-four pounds or two bushels and that the bags were not included in the sale. It seems to us that this was in effect a sale of oats by the bushel. The fact that the oats were charged on the plaintiffs' books by the bag is immaterial so long as it was understood that the bags were to contain and did contain two bushels of thirty-two pounds each. It is difficult to see how the defendant could have lost any benefit which it was the purpose of the statute to insure to a buyer. The case of *Eaton v. Kegan*, *ubi supra*, is materially different from this. The oats and meal were sold in that case by the bag and charged by the bag, and "there was no evidence that they were sold in any other way than as charged, nor that the same were weighed or measured, nor of the quantity contained in each bag other than that they were of the value charged." There is evidence of precisely the contrary character in this case.

Exceptions overruled.

HARRY B. REID vs. JOSEPH K. BERRY & another.

Suffolk. January 16, 1901. — March 2, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

There may be a mechanic's lien under Pub. Sts. c. 191, § 1, for grading which is reasonably necessary for the proper construction and occupation of a house.

Upon the issue whether a contract to do certain work for a price named was made at the time alleged, an expert cannot be asked what in his opinion would be a fair price or value for the work, that having nothing to do with the question.

PETITION to enforce a mechanic's lien upon certain real estate on Lindsey Street, in Dorchester, a part of Boston, filed January 22, 1900.

At the time of the alleged contract the respondent Berry and one Herbert A. Merry were tenants in common of the property. Merry sold out to Berry in August, 1899, and the petition was brought against Berry alone. Berry did not enter his appearance nor defend the suit, but testified at the trial as a witness for the petitioner. The Taunton Savings Bank, mortgagee of the premises and purchaser thereof at foreclosure sale, was admitted to defend the suit.

At the trial in the Superior Court, before *Hopkins, J.*, the jury found for the petitioner on the issues submitted to them as stated in the opinion of the court.

The contract was an oral one, and was stated in the petition as follows: "To dig and build cellar; grade the lot; make sewer connections; concrete the cellar — all to be done for five hundred and ten dollars; all labor and materials to be furnished therefor."

The petitioner testified that for \$510 he "was to dig the cellar and build the wall, the cellar complete, and do the grading and connect the sewer." There was evidence, that the lot was low, the greater part of it being below grade, and that the performance of the contract required grading by filling the lot to the height agreed upon; that the underpinning of the house was required by the contract to show three and one half feet above the ground, and the petitioner was to grade up to the underpinning, and that in doing this he used more than a hundred

loads of earth from outside in addition to the earth procured from digging the cellar.

One of the issues submitted to the jury was "Did the petitioner make the contract at the time alleged?" The respondent called as a witness one McMorrow, who was qualified as an expert, and asked him what in his opinion would be a fair price or value, as between contractor and owner, of the performance of the contract testified to in this case, stating it. The question was objected to by the petitioner and excluded by the judge, and the respondent excepted.

The judge ordered the lien established; and the respondent alleged exceptions.

W. E. Fuller, Jr., for the respondent, contended, that the work of filling and grading was not labor performed or furnished, or materials furnished and actually used in the erection, alteration, or repair of a building or structure within the meaning of Pub. Sts. c. 191, § 1, and the contract being an entire one for a round sum, no lien could be established; and that, even if the whole claim was not void, the order of the Superior Court establishing the lien which included the grading could not be sustained.

G. J. Tufts, for the petitioner.

MORTON, J. This is a petition to enforce a mechanic's lien upon the premises described in the petition for digging, building and concreting a cellar, making sewer connections, and grading the lot, all for an entire sum. The case was defended by the Taunton Savings Bank as mortgagee. Certain issues, framed by it and agreed to by the petitioner, were submitted to the jury and found in favor of the petitioner. The substance of these findings was that the petitioner made the contract at the time alleged and performed it as required; that the labor and material were furnished by virtue of an agreement with or the consent of the owner of the building; and that, if there was any inaccuracy in the account, the plaintiff had not knowingly claimed more than was due. Exceptions were taken by the bank to the allowance of a motion by the petitioner for leave to amend the petition, and to the overruling of a motion made by it for leave to amend one of the issues. These exceptions have been waived. There was also an exception taken by the bank to the exclusion of a question by it to an expert as to what

would be a fair price for digging, building and concreting the cellar and making the sewer connections and grading the lot. This exception has not been argued, though it has not been waived. The bank filed a motion that judgment should be entered for it, notwithstanding the findings of the jury upon the issues submitted to them. The court overruled the motion, and ordered a lien to be established for the petitioner for the amount claimed. The bank excepted to these rulings and the principal question arises under them and is whether the petitioner is entitled to a lien for the grading; it being contended by the bank that the contract was entire and indivisible, and that if the lien is invalid in part it is invalid altogether.

It is to be noted that no issue appears to have been framed by the bank or to have been submitted to the jury in regard to the grading. From the issues that were submitted, no question would seem to have been raised before the trial in regard to the petitioner's right to a lien for the grading. As the exceptions stand it is open to doubt whether the precise question was called to the attention of the court. There is nowhere in the exceptions a statement to that effect. But we think that if the grading was reasonably necessary to the proper construction and occupation of the house it fairly could be considered as a part of its erection and that the petitioner would have a lien for it. In *Perry v. Potashinski*, 169 Mass. 351, it was assumed that there was a lien for grading. In *Beatty v. Parker*, 141 Mass. 523, 526, it was held that a drain pipe from the house to a sewer in the street was a part of the house and that there was a lien for it. And in *Hubbard v. Brown*, 8 Allen, 590, 594, it would seem that a lien was established for steps leading into the garden. In the present case the question whether the petitioner was entitled to a lien for the grading was a mixed question of law and fact. It must be assumed that the court found as a fact that the grading was reasonably necessary to the proper construction and occupation of the house. And we cannot say as matter of law that upon the evidence reported the finding was wrong. See *Yearsley v. Flanigen*, 22 Penn. St. 489; *Henry v. Plitt*, 84 Mo. 237.

The question to the expert was rightly excluded. It had nothing to do with any question before the court.

Exceptions overruled.

CHARLES J. MCINTIRE vs. CHARLES LINEHAN & another.

Middlesex. January 16, 1901. — March 2, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

A probate bond in the ordinary form filed in the registry of probate, satisfactory to the beneficiaries and accepted orally by the judge of probate but never approved by him in writing as required by Pub. Sta. c. 143, § 2, is valid at common law, and the sureties are liable upon it in a suit brought in the name of the judge of probate. Whether such bond is invalid as a statutory bond, *quære*.

Where, in a probate bond in the ordinary form, the principal is described as trustee under a certain will for two beneficiaries named, whereas in fact there are also other beneficiaries not mentioned, this omission will be regarded as a mistake, the plain intention being that the bond should be security for all persons beneficially entitled.

The granting by a judge of probate of a petition for leave to bring suit in his name against the sureties on a trustee's bond, settles nothing but the leave to sue and cannot affect any question of liability upon the bond.

A surety on a trustee's bond is liable for any default on the part of the trustee in not accounting for assets received before as well as after the execution of the bond.

CONTRACT upon an alleged probate bond signed by Linus M. Child as principal and the defendants Charles Linehan and H. Burr Crandall as sureties. Writ dated April 18, 1900.

At the trial in the Superior Court, before *Gaskill, J.*, it appeared that the order of the judge of the Probate Court authorizing the suit to be brought in his name was as follows:

"On the petition of George A. Blaney of Newton in the County of Middlesex, and others, as trustee and beneficiaries under the will of Sarah Baxter, late of said Newton, deceased, praying that they may be authorized to bring an action upon a certain probate bond, therein described, dated the first day of January, in the year of our Lord one thousand eight hundred and ninety-five, alleged to have been given for the faithful discharge of his trust by Linus M. Child, a trustee under the said will, as principal, and Charles Linehan and H. Burr Crandall as sureties, in the sum of forty thousand dollars.

"All persons interested in the matter appearing in court in person and by counsel, and objection being made and a hearing given thereon, it appearing that by a previous decree of this

court on December 11, 1894, the said Linus M. Child was ordered to file a new bond, as trustee under said will, with sufficient sureties, in the sum of fifty thousand dollars, on or before the twenty-sixth day of December, 1894; that said Child failed to obey said previous decree, but that sometime afterward, probably during the month of January, 1895, he caused to be left in the office of the register of probate and placed among the papers in the case of said Sarah Baxter on file in this court, where it has ever since remained, a bond in the sum of forty thousand dollars, which bond is described in the petitioner's petition, but it does not appear to have been filed nor does it appear to have been presented to either judge of this court for examination and approval;

"Now, therefore, in order that the beneficiaries of said trust may have opportunity to try, among other questions, the question of the validity of said bond, it is decreed, that said petitioners be, and they are hereby authorized to bring suit on said bond in the Superior Court for this county, in the name of the first judge of this court, for the recovery of any damage suffered by said petitioners through any infraction of its condition."

The bond sued upon was in the ordinary form of a probate bond the clause in regard to the filing of an inventory being stricken out. The principal, Linus M. Child, was described therein as "trustee of certain estate given in trust for the benefit of D. Baxter Merriam and Miriam S. Shattuck under the will of Sarah Baxter late of Newton." There were other beneficiaries besides the two named, but the others were not mentioned in the bond. The facts which appeared at the hearing and the findings warranted by them are stated in the opinion of the court.

The defendants in various forms requested the judge to rule that the action could not be maintained, and also requested him to rule that execution should issue for only such sums as were found due for breaches occurring subsequently to the delivery of the bond and not for the amounts found due by the decree of the Probate Court, which included an accounting for all assets received by the trustee before as well as after the date of the bond.

The judge refused so to rule, and ruled that the action could

be maintained, and found that execution should issue for the sum of \$2,302.40, being the amount named in the decree of the Probate Court with interest to the date of the finding, and the defendants excepted.

At the defendants' request, the judge reported the case for the consideration of this court. If upon all the evidence the plaintiff was entitled to recover, judgment was to be entered on the finding, or upon such modification thereof as to this court might seem proper; otherwise judgment was to be entered for the defendants. The questions of law raised by the report are stated in the opinion of the court.

S. L. Whipple & M. R. Sears, for the defendants.

G. A. Blaney, for the plaintiff.

MORTON, J. This is an action against the sureties upon a bond given by the late Linus M. Child, Esq., as trustee under the will of one Sarah Baxter to the plaintiff.

The defences are, 1st, that the bond did not take effect as a probate bond for want of the written approval thereon of the judge of probate as required by Pub. Sts. c. 143, § 2; 2d, that it is not binding as a common law bond because it was intended as a probate bond and because it was not accepted by the obligee; 3d, that the beneficiaries named in it are D. Baxter Merriam and Miriam S. Shattuck and it is effective only to the extent to which they are interested in the estate; and 4th, that the assessment of damages is wrong.

Exceptions were taken to the admission of certain evidence but they have not been argued and we therefore treat them as waived.

There were also demurrers which were overruled, and requests which were refused. But the defences as stated above include, we think, all the matters on which the defendants rely.

We do not deem it necessary to consider whether the bond is a good probate bond since we are of opinion that if it is not it is a good bond at common law. It appears that Mr. Child was appointed trustee under the will of said Sarah Baxter in December, 1870, and duly gave bond. Both sureties died and upon a petition by the beneficiaries, the Probate Court in December, 1894, ordered Mr. Child to give a new bond in the sum of \$50,000. After the entry of this decree Mr. Child, in accord-

ance with a suggestion from the court, communicated with counsel for the petitioner, and it could have been found, we think, by the presiding judge that as a result of such communication and shortly after the proceedings the bond in suit was prepared by Mr. Child and filed by him in the Registry of Probate as and for a compliance with the decree. It could also have been found, we think, that this bond was satisfactory to the beneficiaries and was accepted by the obligee. It was indorsed and put with the papers in the case when left by Mr. Child. It was seen there a few weeks after by the counsel for the beneficiaries. There is no evidence that any other bond was ever prepared or offered by Mr. Child as the bond required by the decree. He continued to act thenceforward as trustee without objection from any of the parties interested. It was at the suggestion of the court that Mr. Child communicated with counsel for the beneficiaries in regard to filing a bond in a less sum than that required by the decree. And there was evidence that counsel for the beneficiaries told the court that although the decree required a bond for \$50,000 they would be satisfied with a bond for \$40,000. These various considerations and the evidence thus referred to were amply sufficient to justify a finding that the bond was furnished by Mr. Child as and for the bond required by the decree and was accepted by the obligee and was satisfactory to the beneficiaries. We assume without deciding that for want of the written approval of the judge of probate the bond is invalid as a statutory bond. But we think that it is valid at common law. *Farr v. Rouillard*, 172 Mass. 303, 304, 305, and cases cited. There is nothing contrary to law in its provisions. It was voluntarily given upon a sufficient consideration to secure the performance of his official duties by the trustee in accordance with the decree of the court and the statute in such cases made and provided. There is no reason why effect should not be given to it by holding it good at common law. Notwithstanding only two of the beneficiaries are named in it, it is plain that the bond was intended as a security for all beneficially entitled and we see no difficulty in so regarding it. *Farr v. Rouillard*, *ubi supra*.

The defendants contend that the question whether the bond was accepted by the obligee is concluded by the finding of the

Probate Court at the hearing on the petition for leave to sue, that the bond did not appear to have been presented to either judge of that court for his examination or approval. But the judgment on that petition settled nothing except that the petitioner might bring suit on the bond. *Fuller v. Cushman*, 170 Mass. 286. *Richardson v. Oakman*, 15 Gray, 57.

In regard to the assessment of damages the defendants contend that there is no evidence to show that certain items and investments for which the trustee was held accountable were received or made by him after the execution of the bond in suit. But it is settled that sureties are liable for any default on the part of their principal in not accounting for amounts received before as well as after the execution of the bond signed by them. *Choate v. Arrington*, 116 Mass. 552. *Dawes v. Edes*, 13 Mass. 177.

Judgment on the finding. Execution to issue as ordered.

HENRY O. SAWYER & others vs. METROPOLITAN WATER BOARD & another.

Worcester. January 17, 1901. — March 2, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Section 14 of the Metropolitan Water Supply Act, St. 1895, c. 488, provides that, if persons suffering injury in an established business on land in West Boylston cannot agree with the water board as to the amount of damages to be paid to them, "such damages shall be determined and paid in the manner hereinbefore provided." *Held*, that the "manner hereinbefore provided" is a petition to the Supreme Judicial Court for a commission under the previous provisions of the same section and not a petition to the Superior Court for assessment of damages by a jury under the provisions of the preceding section.

PETITION for the assessment of damages under St. 1895, c. 488, § 14, for injury to and destruction of an established business of the petitioners on land in the town of West Boylston owned by them on April 1, 1895, filed in the Superior Court for the county of Worcester, December 12, 1898.

The respondents filed a motion to dismiss the petition, on the ground that the Superior Court had no jurisdiction thereof, and

that the only remedy of the petitioners was by filing a petition in the clerk's office of the Supreme Judicial Court for the county of Worcester, in accordance with St. 1895, c. 488, § 14.

At a hearing in the Superior Court, before *Fessenden, J.*, the judge, being of opinion that the interests of justice required that the questions raised should be disposed of before the expense and delay of a jury trial was incurred, ruled that the petition be dismissed, and reported the case for the consideration of this court. If the ruling was right the decree dismissing the petition was to be affirmed; otherwise the petition was to stand for trial by jury.

Section 14 of 1895, c. 488, contains the following provision: "In case any individual or firm owning on the first day of April in the year eighteen hundred and ninety-five an established business on land in the town of West Boylston, whether the same shall be taken or not under this act, or the heirs or personal representatives of such individual or firm, shall deem that such business is decreased in value by the carrying out of this act, whether by loss of custom or otherwise, and unable to agree with said board as to the amount of damages to be paid for such injury, such damages shall be determined and paid in the manner hereinbefore provided."

The section from the end of which the above provision is quoted begins as follows: "Said board, upon the application of the owner of any real estate taken for said proposed reservoir upon the Nashua river, or the owner of any real estate entered upon and used, or of any real estate injured by the taking of the waters of said Nashua river, whether said real estate is within or without the Commonwealth, or of any real estate not taken but directly or indirectly decreased in value by this act or the doings of said board thereunder, situated in the town of West Boylston [or in certain parts of the towns of Boylston and Clinton] may agree with such owner upon the damages to be paid for such taking, injury or decrease in value, and if said board and the owner of any such real estate cannot agree upon such damages, such owner may, within two years after the first taking of water, or of land for said reservoir, under the right of eminent domain, file in the clerk's office of the supreme judicial court for the county of Worcester, in term time or vacation, a

petition for the determination of such damages, and thereupon said court, after notice by publication in some newspaper published in the county of Worcester, and in such other manner as the court may order, that all persons entitled to file such petitions will be heard by said court on a day therein named, and a hearing thereon; shall from time to time appoint one or more commissions, each consisting of three disinterested persons, and may after notice and hearing fill any vacancy occurring in any such commission until all petitions referred to it have been heard and determined."

Section 13 of the same chapter begins as follows: "Said board, city, town, person or corporation, if they cannot agree upon any damages, sustained as aforesaid, may, except in the cases in which payment is otherwise provided for in this act, within two years after the day of the taking of any land, water, easements or other property, or of the use of any property, or of the making or change of grade, alteration, discontinuance, or location of a way or railroad, or of the doing of any other act or thing causing the damage, file in the office of the clerk of the superior court for the county in which the property taken, used or affected in value by such taking or other act of said board is situated, a petition, signed by the petitioner or the attorney of the petitioner, for a jury to determine such damages, and thereupon, after such notice as said court shall order, the damages so sustained shall be determined by a jury in said court, in the same manner as damages for lands taken for highways are determined."

H. Parker, for the petitioners.

J. M. Hollowell, Assistant Attorney General, for the respondents.

HOLMES, C. J. This is a petition to recover for the destruction of an established business, alleged to have been caused under the Metropolitan Water Supply Act, St. 1895, c. 488. The petition was filed in the Superior Court, and asked for a jury under § 13. It was dismissed on motion, for want of jurisdiction, and the case comes here on report. It is provided by § 14 that, if persons injured in this way cannot agree with the Metropolitan Water Board as to the amount of damages to be paid, "such damages shall be determined and paid in the man-

ner hereinbefore provided." The question is whether the words quoted refer to the manner provided in § 14, which is a petition to the Supreme Judicial Court for a commission, or that specified in § 13, which is a petition to the Superior Court for a jury.

By § 12 the water board may agree with the party injured upon "the damages sustained by any person . . . in property by any taking of property or by any change of grade, . . . or by the construction, etc. . . . or by the interference with the use of any water, or by any other act or thing done by said board under this act." It will be noticed that the words "by any other act or thing" refer back to and qualify "sustained by any person in property," in the same way as do the words "by any taking of property" and the succeeding clauses. The damage referred to throughout is damage sustained in property, and, it would seem, in property which can be taken by eminent domain.

The act goes on to provide by § 13 that the parties, "if they cannot agree upon any damages, sustained as aforesaid, may, except in the cases in which payment is otherwise provided for in this act, within two years after the day of the taking of any land, . . . or of the use of any property, or of the making of any change of grade, . . . or of the doing of any other act or thing causing the damage," file a petition for a jury "to determine such damages" in the Superior Court. Here again it will be seen that all the broad and general words of the section are confined to "damages, sustained as aforesaid." "As aforesaid" refers to § 13, and therefore the provisions of § 14 are confined to damages sustained in property. If then the statute stopped here the petitioners could not recover under the act. *Whitman v. Boston & Maine Railroad*, 3 Allen, 133, 141, 142. *Edmonds v. Boston*, 108 Mass. 535. *Williams v. Commonwealth*, 168 Mass. 364. Lewis, Em. Dom. § 487.

The statute goes on in § 14 to provide for owners of land taken upon the Nashua River, or entered upon and used, or injured by the taking of the waters of the Nashua River, whether the land is within or without the Commonwealth, or of certain real estate in West Boylston, Boylston or Clinton, not taken but directly or indirectly decreased in value by the statute and the

doings under it. To these it gives a petition to the Supreme Judicial Court for a commission. Among other things "said commissions shall determine the damage to and value of real estate, machinery and business, and from time to time report," etc. Then follows the clause giving the petitioners their rights. "In case any individual or firm owning . . . an established business on land in the town of West Boylston, whether the same shall be taken or not under this act, . . . shall deem that such business is decreased in value by the carrying out of this act, . . . and unable to agree with said board as to the amount of damages to be paid for such injury, such damages shall be determined and paid in the manner hereinbefore provided." It seems to us that this last clause is carrying on the thought of those that precede it. The immediately preceding clause had spoken of damage to business as a matter to be estimated by the commissioners, and this one goes on to provide for another case of damage to business. The earlier part of the section dealt with West Boylston, this continues to deal with it. It seems to us pretty plain that as the section had provided for a commission before it is providing for a commission still.

It is provided in § 15 that "any persons whose property is taken under the right of eminent domain, or entered upon or injured by the taking of said water, if dissatisfied with any determination of damages made by any commission, may . . . claim a trial by jury." It is unnecessary to consider whether this provision extends to the petitioners' case. It cannot do so except upon the ground that destruction of business is made by the act a taking of property within its meaning, whatever might be the case in the absence of § 14. If that argument should prevail, which we do not intimate to be likely, of course it would impair if not destroy the argument based on the word "property" in § 12. But in § 13 there is an exception "in the cases in which payment is otherwise provided for in this act," and if this does not refer to § 14 it has no satisfactory meaning at all. Taking the exception in § 13 and the juxtaposition of words in § 14, we are satisfied that "hereinbefore" means in § 14, that the petition should have been filed in the Supreme Judicial Court, and that it properly was dismissed.

Decree affirmed.

JOSEPH B. MOORS & another *vs.* ADOLPH LADENBURG
& others.

Suffolk. January 18, 1901. — March 2, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

In Pub. Sts. c 161, § 110, providing that a subsequently attaching creditor may dispute a prior attachment "on the ground that the sum demanded in the first suit was not justly due, or was not payable when the action was commenced," the words "when the action was commenced" apply to "justly due" as well as to "payable" and give no remedy where the sum demanded in the first suit has been paid since that action was begun.

A bill in equity may be maintained by one who has attached certain property, to enjoin a non-resident holder of a prior attachment on the same property from proceeding further with his action, on the ground that his debt has been paid since he began it; and the order or decree addressed to the defendant restraining the further prosecution of the action may be served on his attorney therein, jurisdiction over the defendant having been obtained by service of the subpoena on such attorney.

BILL IN EQUITY by attaching creditors of the Keen Sutterlee Company, a corporation having its place of business at Philadelphia in the State of Pennsylvania, to restrain the defendants from the further prosecution of a suit brought by them against that corporation, in which they made an attachment prior to that of the plaintiffs, the debt sued on by them having been paid in full since their suit was begun, filed February 1, 1900.

The bill as amended was as follows: "Joseph B. Moors and Arthur W. Moors, both of Boston, in the county of Suffolk, partners under the firm of J. B. Moors & Company, bring this bill of complaint against Adolph Ladenburg, Ernest Thalman and Richard Linnburger, partners under the firm of Ladenburg, Thalman & Company, having their usual place of business in the city, county and State of New York.

"1. The plaintiffs are creditors of the Keen Sutterlee Company, a corporation having its principal place of business in Philadelphia, in the State of Pennsylvania, and on January 11, 1896, brought suit in this court against said Keen Sutterlee Company for the purpose of collecting their debt against said company, and caused certain goods then in the possession of said

Keen Sutterlee Company in Boston, of the value of three thousand seven hundred and twenty-four dollars and nineteen cents, \$3,724.19, to be attached on said writ.

" 2. The Keen Sutterlee Company has been defaulted in said action and the plaintiffs are entitled to judgment therein to the amount of their claim, with interest, to wit, the sum of twenty-nine thousand eight hundred and twelve dollars and ninety-seven cents, \$29,812.97, but judgment in said action has been staid to await the proceedings in the suit of Ladenburg, Thalman & Company against said Keen Sutterlee Company hereinafter referred to.

" 3. Ladenburg, Thalman & Company, on said January 11, 1896, were also creditors of said Keen Sutterlee Company, and on said day, but a few minutes before the attachment by the plaintiffs as aforesaid, brought an action in this court to collect their said claim and cause the said goods of said Keen Sutterlee Company to be attached thereon. The complainants have intervened in said action as subsequent attaching creditors, by petition to the court in the manner provided by statute, and are parties to said suit with all the powers and privileges to which subsequent attaching creditors are entitled.

" 4. Said Keen Sutterlee Company have not appeared but have been defaulted in said suit of said Ladenburg, Thalman & Company against said Keen Sutterlee Company; and said Ladenburg, Thalman & Company are entitled to have judgment entered therein in their behalf, and to take out execution on said judgment and to levy on said goods.

" 5. Since the bringing of said suit by said Ladenburg, Thalman & Company against said Keen Sutterlee Company, said Ladenburg, Thalman & Company have been fully paid out of securities held by them and from other sources, so that now nothing is due from said Keen Sutterlee Company to said Ladenburg, Thalman & Company, and the further prosecution of their said suit against said Keen Sutterlee Company and the levy upon said goods will prevent the plaintiffs from applying the same to the satisfaction of their claim.

" 6. No member of the firm of Ladenburg, Thalman & Company can be reached to be served with process within this jurisdiction and the said firm has no property which can be come at

to be attached within this jurisdiction ; but Edwin N. Hill, an attorney of this court, was and is the attorney for the said Ladenburg, Thalman & Company in their action against the Keen Sutterlee Company, which action is now pending in the Superior Court for the county of Suffolk.

"Wherefore, the plaintiffs pray that the said Ladenburg, Thalman & Company may be restrained from the further prosecution of their said suit against said Keen Sutterlee Company, and may be ordered to discontinue the same, and for further and general relief."

Edwin N. Hill, named in the sixth paragraph of the bill, appeared specially for the several defendants for the purpose of objecting to the jurisdiction of the court over the defendants, and for the special purpose of making a motion to dismiss the bill for want of jurisdiction.

Upon such motion to dismiss, the Superior Court ordered and decreed that the bill be dismissed, with costs ; and the plaintiffs appealed.

R. M. Morse, for the plaintiffs.

E. N. Hill, for the defendants.

HOLMES, C. J. This is an appeal from a decree of the Superior Court dismissing the plaintiffs' bill, on motion, for want of jurisdiction. The object of the bill is to restrain the defendants from proceeding further in a suit against a non-resident debtor whose property they have attached, on the ground that since the suit was begun they have been paid. The plaintiffs are creditors of the same debtor and have an attachment on the same property, but subsequent to that of the defendants. The defendants also are non-residents, and the only service obtained has been upon the lawyer employed by them in the suit sought to be enjoined.

The plaintiffs are content that their bill should be dismissed if they have a right to file a petition in the suit under Pub. Sts. c. 161, §§ 110-120. By § 110 a later attaching creditor "may dispute the validity and effect of the prior attachment, on the ground that the sum demanded in the first suit was not justly due, or was not payable when the action was commenced." The sum demanded by the defendants was justly due "when the action was commenced," and therefore the plaintiffs are not

helped unless the words last quoted qualify "payable" alone and not "due." In the Revised Statutes there was a comma after "payable" as well as after "due," Rev. Sts. c. 90, § 83, but in the report as printed of the commissioners, who contrived this remedy as a substitute for existing statutes, the punctuation was as at present. c. 90, § 73. A more substantial ground for argument is to be found in § 113, "if it appears to the court that a part of the sum demanded in the prior suit is not justly due, or was not payable when the action was commenced," it shall order the attachment dissolved etc. This follows the language originally suggested by the commissioners and certainly looks like an investigation of the present state of indebtedness, and seems to confine the reference to the commencement of the action to the word "payable." On the other hand in § 110, equally following the original language, the words are "was not justly due," and the "was" can be explained only by reference to the time when the action was begun. This latter phrase seems to us to be the governing and least ambiguous expression of intent, and to lay down a more convenient rule than if the creditor were allowed to go into the state of the accounts between the plaintiff and the defendant since the action was begun. The notes to the Revised Statutes show that the sections were intended to prevent fraud in attachments, and evidently have in mind the case where a debtor procures or permits his property "to be attached by one who has no legal cause of action against him." Notes to §§ 73-82. We are of opinion that the plaintiffs have not a remedy under the statute.

With regard to the present bill there is no doubt of the general principle that when you have a *res* within the jurisdiction of the court the court may deal with it, although it cannot reach the person of the owner. See e. g. *Felch v. Hooper*, 119 Mass. 52; *McCann v. Randall*, 147 Mass. 81; *Short v. Caldwell*, 155 Mass. 57; *Du Puy v. Standard Mineral Co.* 88 Maine, 202, 210. There is no doubt, either, that there is such a *res* within the jurisdiction here. The attached property, which is the only matter concerned in the defendants' suit, as the foreign debtor did not appear, is here, and remotely the object of the plaintiffs' proceeding is simply to require the defendants to keep their hands off it. That, however, is not the immediate scope of this

bill. The *res* at which the bill aims is the lawsuit, but that also is a *res* within the territorial jurisdiction of this Commonwealth. The difficulty in the case and the doubt is on the question whether the court has laid its hands on any *res* sufficiently to deal with it, and whether it can do so under the bill as framed.

Of course the court of equity does not enjoin the judges of the court of common law. See *Winchester v. Thayer*, 129 Mass. 129, 134, 135. Yet if not, the question is how it is to get hold of the suit. It might enjoin the lawyer engaged for the time being on the defendants' behalf. But the lawyer is not made a party, and service on him as representing the defendants is a different matter. On the whole, however, when it is considered that the only acts which it is sought to prevent are acts in this jurisdiction and in a Massachusetts court, and that they are acts which cannot be done except by agents locally present, we think that the court properly may issue its order addressed to the defendants forbidding them or their agents to do those acts here; and that if such an order or decree is served on the attorney, who is the same person as the defendants for the purposes of the suit sought to be enjoined, (*Pearl v. West End Street Railway*, 176 Mass. 177, 179,) that service is sufficient to make a further attempt to proceed with that suit a contempt. *Marco v. Low*, 55 Maine, 549, 553. *Chalmers v. Hack*, 19 Maine, 124, 127. See *Clafin v. Lowe*, 157 Mass. 252, 254; *Aldrich v. Blatchford*, 175 Mass. 369.

Decree reversed.

WILLIAM S. APPLETON *vs.* CITY OF NEWTON.

Suffolk. January 18, 21, 1901. — March 2, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, & BARKER, JJ.

In a taking of land by a city for the purposes of its water supply under statutory authority, if the statutes giving the authority are correctly referred to in stating the purposes of the taking, a further reference to other statutes not applicable does not invalidate the taking; and, without naming the statutes, a statement that the land is taken "for the purpose of the water supply for said city of Newton and an additional water supply therefor" is a sufficiently definite statement of the purposes of the taking.

A taking of land for a public use is strictly a proceeding *in rem*. In all such cases it is enough if there is such a notice as makes it reasonably certain that all persons interested who easily can be reached will have information of the proceedings, and that there is such a probability as reasonably can be provided for, that those at a distance also will be informed. It is for the Legislature to say, what means of knowledge will be enough to affect the landowner with notice.

St. 1872, c. 844, an act to supply the town of Newton with water, enlarged by St. 1889, c. 302, gave a landowner whose land was taken under the act three years within which to file a petition for the assessment of damages for the taking, and did not require that any formal notice of the taking should be given to him other than constructive notice by filing an instrument of taking in the registry of deeds. The taking of land under the act required concurrent action by the mayor and aldermen and common council of Newton after it became a city. *Held*, that the Legislature might assume that persons whose lands were taken under the act would have such knowledge on the subject of the taking, that the constructive notice by filing an instrument of taking in the registry of deeds would be all that was required to enable them to protect their rights within the three years allowed them for that purpose, and that the act is constitutional.

BILL IN EQUITY seeking to remove a cloud from the title to the plaintiff's land created by an instrument dated February 24, 1890, and recorded February 26, 1890, purporting to be a taking by the defendant of certain land of the plaintiff therein described, for the purposes set forth in St. 1872, c. 844, St. 1876, c. 54, and St. 1889, c. 302, "and all other acts relating to supplying the city and town of Newton with water and for the purposes of the water supply for the said city of Newton and an additional water supply therefor," filed August 8, 1899.

The case was reserved by *Hammond, J.*, upon the bill, answer and evidence for the consideration of the full court. The bill among other matters set forth the following:

First. The statement in said paper of taking, Exhibit A, of the purposes for which said strip of land was taken, is not sufficiently definite and explicit to comply with the requirements of St. 1872, c. 844, § 2.

Second. Said paper of taking, Exhibit A, states that the taking of said strip is for the purposes set forth in St. 1876, c. 54, and St. 1889, c. 302, and the plaintiff says that, for the purposes set out in said acts, lands in Newton could not be taken.

Third. The purposes for which said strip of land was in fact taken were not purposes for which the taking of the strip was by law authorized.

Fourth. The provisions of said St. 1872, c. 844, so far as they purport to authorize the taking of said strip, are unconstitutional

and void, since they do not make adequate provision for compensation to the plaintiff for said strip so taken, for the reason that said act does not require any notice to be given to the plaintiff of the taking of his property, and the remedy afforded to the plaintiff for securing compensation is at the peril of his finding out within three years that a paper of taking has been filed in the registry of deeds. Wherefore the plaintiff says that said provisions of St. 1872, c. 344, are in violation of the requirements of the Constitution of Massachusetts, Declaration of Rights, Article 10, as follows: "Whenever the public exigencies require, that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor;" and are in violation of Article 14 of the Amendments of the Constitution of the United States, as follows: "Nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

That by reason of the matters above alleged, the said alleged taking under said paper, Exhibit A, was null and void, and said paper recorded in the registry of deeds is a cloud upon the plaintiff's title to the strip of land alleged to have been taken, which cloud ought in equity and good conscience to be removed.

The bill prayed that the alleged taking might be declared null and void, and that the city of Newton, and its agents and officers, be perpetually enjoined from asserting or claiming any title to said strip of land by virtue of the alleged taking, and that said city be directed to execute and deliver, by its mayor, to the plaintiff a deed releasing to the plaintiff in fee the strip of land described in the paper of taking.

The instrument of taking, called above Exhibit A, was as follows:

"Know all men by these presents. That the City of Newton a municipal corporation duly established according to law, situated in the County of Middlesex and Commonwealth of Massachusetts hath taken the parcels of land hereinafter described by virtue and in part execution of and for the purposes set forth in the following acts of the Legislature of said Commonwealth: to wit: Chapter three hundred and forty-four of the acts of the year eighteen hundred and seventy-two, entitled 'An Act to

Supply the Town of Newton with Water' Chapter fifty-four of the Acts of the year eighteen hundred and seventy-six, entitled 'An Act in Addition to an Act to Supply the Town of Newton with Water' Chapter three hundred and two of the Acts of the year eighteen hundred and eighty-nine entitled 'An Act to Provide an Additional Water Supply for the City of Newton' and all other Acts relating to supplying the City and Town of Newton with water; and for the purposes of the water supply for the said City of Newton and an additional water supply therefor. The following is a description of the land so taken as aforesaid: being a certain tract of land situated in the City of Newton in the County of Middlesex and Commonwealth of Massachusetts bounded and described as follows to wit: [Description.] Said parcel of land is shown upon a 'Plan of lands in the City of Newton taken by the City of Newton for an additional water supply,' dated December thirtieth eighteen hundred and eighty-nine, and to be recorded herewith. Said land so far as is known belongs to William S. Appleton. To have and to hold the said parcel of land to the said City of Newton its successors and assigns, to its and their sole use forever for the purposes of and agreeably to the provisions of said Acts. In witness whereof the said City of Newton and the following officers thereof have caused the corporate seal of said City of Newton to be hereto affixed and these presents to be signed and sealed by Heman M. Burr, the Mayor of said City of Newton, and by a majority of the Board of Aldermen of said City of Newton, and by a majority of the Common Council of said City of Newton, this twenty-fourth day of February A. D. 1890."

This instrument was signed by the mayor and by a majority of the board of aldermen and by a majority of the common council of the city of Newton. It was acknowledged by the mayor, a member of the board of aldermen and a member of the common council, and was certified to have been recorded in the Middlesex South District Deeds on February 26, 1890.

The plaintiff alleged and contended, that he had no notice of the taking until some time after December, 1897, several years after his right to claim damages for the taking had expired. The substance of the evidence upon the question of notice is stated in the opinion of the court.

The plaintiff showed by the assessors' books of the city of Newton and by his tax bills, that the valuation of his land in Newton had remained the same from 1889 to 1894, and from 1894 to 1899 was slightly increased. It was argued for the plaintiff that this gave him the right to assume that no part of his land had been taken.

R. S. Gorham & Roland Gray, for the plaintiff.

W. S. Slocum, for the defendant.

KNOWLTON, J. The first question raised at the argument was whether the form of the taking of the plaintiff's land was sufficient to answer the requirements of the statute. This question must be answered in the affirmative. The instrument which was duly recorded in the registry of deeds, signed by the mayor and a majority of the board of aldermen and a majority of the common council of Newton, set forth that the city had taken the land, which was described by metes and bounds, and by a reference to a plan, and by giving the name of the owner, and stated that the taking was "in part execution of and for the purposes set forth in the following acts of the Legislature of said Commonwealth: to wit: Chapter three hundred and forty-four of the acts of the year eighteen hundred and seventy-two, entitled 'An Act to Supply the Town of Newton with Water' Chapter fifty-four of the acts of the year eighteen hundred and seventy-six entitled, 'An Act in Addition to an Act to Supply the Town of Newton with Water' Chapter three hundred and two of the Acts of the year eighteen hundred and eighty-nine entitled 'An Act to Provide an Additional Water Supply for the City of Newton' and all other Acts relating to supplying the City and Town of Newton with water: and for the purposes of the water supply for the said City of Newton and an additional water supply therefor."

There is no doubt that the taking was within the authority which the St. 1872, c. 844, as amended by the St. 1889, c. 802, purports to give. These two statutes being referred to as a foundation for the proceedings, the validity of the taking is not affected by the reference to other acts relating to the water supply of Newton which have no direct application to the taking of this land. Apart from the reference to the statutes for a statement of the purposes of the taking, an express statement

in the words, "for the purposes of the water supply for the said City of Newton and an additional water supply therefor," is sufficiently definite. The filing of this paper in the registry of deeds, in pursuance of a former order of taking which was regularly passed by both branches of the city council and approved by the mayor, was a good taking to pass the title under the statutes. St. 1872, c. 344. St. 1889, c. 302. *Ham v. Salem*, 100 Mass. 350. *Lexington Print Works v. Canton*, 167 Mass. 341, 344 and cases cited. *Burnett v. Boston*, 173 Mass. 173. *Rockport v. Webster*, 174 Mass. 385.

The most important question in the case is whether the St. 1872, c. 344, is constitutional, inasmuch as it contains no provision for a formal notice of the taking to landholders, either before or after the appropriation of the land. The determination of the question whether there is a necessity for the taking of the property in the exercise of the right of eminent domain lies with the Legislature as the representative of the sovereign power. On this question, the parties to be affected by the taking are not entitled to notice or a hearing. *Holt v. City Council of Somerville*, 127 Mass. 408. *Old Colony Railroad, petitioner*, 163 Mass. 356 and cases cited. All that is necessary is an adequate provision for their compensation, and this of course implies an opportunity to be heard on the amount to be paid. Declaration of Rights, Art. 10. U. S. Const. Amendm. Art. 14. *Brickett v. Haverhill Aqueduct*, 142 Mass. 394, 396, 397. *Chicago, Burlington & Quincy Railroad v. Chicago*, 166 U. S. 226, 241. An opportunity to be heard necessarily involves notice or the means of knowledge of the taking, before the expiration of the time within which they may have a remedy for the deprivation of their property.

It does not follow that personal service of a paper, or formal notice of any kind is necessary. A taking of land for a public use is strictly a proceeding *in rem*, the *res* being within the jurisdiction of the State. In all such cases it is enough if there is such a notice as makes it reasonably certain that all persons interested who easily can be reached will have information of the proceedings, and that there is such a probability as reasonably can be provided for, that those at a distance also will be informed. *Huling v. Kaw Valley Railway & Improvement Co.*

130 U. S. 559, 564. *Hagar v. Reclamation District No. 108*, 111 U. S. 701, 711. *McMillen v. Anderson*, 95 U. S. 37. *Davidson v. New Orleans*, 96 U. S. 97. *In re Union Elevated Railroad*, 112 N. Y. 61, 75. *Baltimore Belt Railroad v. Baltzell*, 75 Md. 94. *State v. Messenger*, 27 Minn. 119. It is for the Legislature, within proper limitations, to say what means of knowledge will be enough to put upon a landowner the duty, within a prescribed time, to take measures to obtain his compensation if he wishes to save his rights. The Legislature in this case has given the petitioner three years after the taking of his land, within which to commence a suit, and has not required that any formal notice of the taking should be given him other than constructive notice by filing a paper in the registry of deeds. The precise question before us is whether it is so plain that the Legislature has failed to make reasonable provisions for giving landowners an opportunity to obtain compensation for land taken, that for this reason we should declare the statute unconstitutional. In fixing a time within which petitions for the assessment of damages may be filed, the Legislature assumed without making a special provision therefor, that landowners would have notice of the taking. There are good grounds for the assumption. In the first place, the statute authorizing the taking is a public law of which every one is presumed to have knowledge. The Legislature has provided for the publication and distribution of printed copies of statutes soon after their enactment. This statute is one, which from its nature, affects people and property only in a very small territory. The subject to which it relates is one of general public interest in the neighborhood affected by it, and it would hardly be possible that such legislation would be proposed and enacted without general knowledge among the people in that neighborhood that such a proposition was being considered. The method of taking the land is also by public proceedings requiring concurrent action of both branches of the city government, whose meetings are ordinarily public, and whose doings are a matter of public record as well as of general comment and discussion. After that, before the taking can become effectual, there must be constructive notice filed in the registry of deeds, where the titles to land may be examined by anybody. Add to this the fact

that the taking would be almost certain to involve a public investigation and inspection of the land itself before the desirability of it would be ascertained, and would usually be followed by physical possession and use, long before the expiration of the three years, and we see that under the provisions of the act in its application to the subject to which it relates, those interested would be almost certain to have knowledge of the proceedings long before the expiration of the three years mentioned in the statute.

In the present case, although the petitioner seems to have misunderstood the situation, it seems that with reasonable diligence he hardly could have failed to know that proceedings had been taken affecting his land, which made it important for him to take action for the preservation of his rights. In the summer and autumn of 1889 he knew that the city authorities were making investigation on his land, boring holes and sinking iron pipes or driving wells a few hundred feet apart, with a view of finding a water supply to be added to that then in use by the city. On January 1, 1890, he wrote to the city engineer a letter as follows: "Dear Sir: I expected that in compliance with your promise you would let me know what report you made to the City Government of Newton in reference to my river front. I have heard nothing from you, & read that the Government is already considering the matter. I hope you will now kindly inform me just what you have recommended to be done." On January 20, 1890, he received a reply in which the city engineer spoke of his report to the city government as follows: It "had no special reference to action in regard to your land; but referred only to the land in the valley of the river in Newton and Needham. But the City Government decided to take immediate action and under the rights granted them by legislative enactment they have nominally taken a strip of your land fronting on the river. But their action is not of such a nature, that I see any difficulty with dealing with you in the manner which I suggested at our last interview. In fact I had proposed seeing you as soon as I could get my plans and surveys perfected. But the Winter has been so mild the work of surveying the meadows in the valley has been attended with great difficulty on account of the high water flooding the land. I will endeavor to

see you in a few days or weeks at most as soon as the plans can be perfected." The land in the valley of the river included the plaintiff's land. The order taking the property was adopted by the city government and approved by the mayor on December 30, 1889, and the taking was recorded on February 26, 1890. After the receipt of this letter the plaintiff made no inquiries, and neither knew or heard anything more in reference to the city's relation to his land until December, 1897, when he found the taking on file in the registry of deeds. The city has continued its iron pipes in the ground, and intends to connect them with its conduit which extends up the valley of the river on the opposite side, but it has not yet connected them. The plaintiff understood in 1890, or about that time, that the land of one Wiswell, next beyond his, had been bought and paid for by the city.

We are of opinion that the Legislature might assume that persons whose lands are taken would have such knowledge on the subject of the taking that the constructive notice by filing an instrument of taking in the registry of deeds would be all that is required to enable them to protect their rights within the three years allowed them for that purpose. A great many statutes have been passed in this Commonwealth, authorizing the taking of land by the right of eminent domain, with no provision for any other kind of notice than this. The constitutionality of none of them, so far as we know, has been questioned on this ground, and they have always been assumed to be constitutional. *Ham v. Salem*, 100 Mass. 350. *Charlestown Branch Railroad v. County Commissioners*, 7 Met. 78. *Davidson v. Boston & Maine Railroad*, 3 Cush. 91, 106. *Chandler v. Jamaica Pond Aqueduct*, 114 Mass. 575. *Woodbury v. Marblehead Water Co.* 145 Mass. 509, 511. *Brock v. Old Colony Railroad*, 146 Mass. 194.

The case last cited is an authority which very nearly covers the question now before us. So far as appears, the only notice that was given in that case that was not given in this, was a publication under the Rev. Sts. c. 89, §§ 46, 48, of notice of the application to the Legislature for a special charter. That gave the plaintiff no knowledge beyond that possessed by the plaintiff in this case, for we understand that the present plaintiff

knew of the authority to the city to procure an addition to its water supply. *Chandler v. Jamaica Pond Aqueduct*, 114 Mass. 575, was very similar to the present case. The constitutionality of a statute like that now before us seems to have been involved in the decision, although it was not argued, but was assumed both by counsel and the court.

We are of opinion that the statute is constitutional.

Bill dismissed.

EDWIN N. HILL & another, assignees, vs. HIRAM A.
MARSTON & others.

SAME vs. CARRIE A. MARSTON & others.

Suffolk. January 22, 1901. — March 2, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

A promise in general terms to give security out of one's property, is merely a personal undertaking having no application to specific property, and does not prevent a subsequent conveyance in pursuance of such promise, made in contemplation of insolvency, from being an unlawful preference.

If any part of a sale or conveyance is fraudulent as an unlawful preference, the whole is void.

A bill of sale of chattels recorded as such, taken as security for a debt but not recorded as a mortgage, gives no title without delivery of the chattels.

HOLMES, C. J. This is a bill in equity brought by the assignees in insolvency of the Phoenix Rattan Company to set aside two bills of sale, absolute in form but mortgages in fact, on the ground that they were preferences. As we think it very plain that the conveyances cannot stand, we shall not discuss the evidence at much length. The bills of sale were executed by the defendant Marston, president of the insolvent company, to himself and his wife, on May 10. Most of the testimony had to be got from him, and he told no more than he had to and hardly was always candid.

To begin at the end, on May 22 the company attempted to execute an assignment for the benefit of creditors, which failed. On that day, of course, the company was insolvent and was known to be insolvent by Marston. He was general manager

of the company, and must be taken to have known all that there was to know, throughout. He knew that there was no change in its affairs between May 10 and May 22. In short he knew on May 10 also that the company was insolvent, although he does not admit it. His wife was charged with his knowledge, as he acted for her and took the bills of sale for her. Starting with this, we go back to the beginning of the transaction.

In the previous April the company already was in straits for money. It had raised a little in March by pledging its open accounts. It had had a scheme for extending its credit, which had fallen through, and it had another plan for raising money which fell through a little later. It was behindhand in paying its debts, and it had been notified by a bank which held its notes that they must be paid as they matured. In this state of things Marston satisfied one of the notes which was overdue, and sent on from Florida to the bank two new notes indorsed by himself and Mrs. Marston to take up the two which remained in the hands of the bank. According to his account he, as president of the company, agreed orally and, so far as appears, in a private conversation, with his wife, that she should be secured by a bill of sale of sufficient merchandise or by a transfer of sufficient book accounts of the company. He also had an understanding with himself to the like effect. It was in pursuance of this conversation and understanding, he says, that the bills of sale were made. On the books of the company the bills of sale are declared to be security not only for these indorsements but also for accounts due to him and Mrs. Marston by the ledger, which in Mrs. Marston's case embraced a loan of \$500 to employees of the company. The bills of sale divided all the property of the company between the president and his wife. It may be mentioned, by the bye, that Mrs. Marston had no property when she signed the note, other than some stock in the Rattan Company.

It is not necessary to point out how unsafe it would be to allow testimony such as we have described to sustain such a transaction at the expense of the other creditors of the company supposing that it purported to state facts sufficient for the purpose. But taking the testimony as literally exact, the facts are not a defence even in Mrs. Marston's case. It is impossible to

treat the promise on or before April 20 and the execution of the bill of sale on May 10 as substantially cotemporaneous and one transaction, on the principle stated in *Hawks v. Locke*, 139 Mass. 205, 207, and adverted to in *Bush v. Boutelle*, 156 Mass. 167, 169. That principle might be applied if necessary, perhaps, when the promise specified the property to be conveyed, as in *Bush v. Boutelle*, and in *Holmes v. Winchester*, 133 Mass. 140. But although the property owned by an individual at any one time is specific, a promise in general terms to give security out of one's property is no more specific in its application than a debt, and does not attach to it; although the moment even a simple debtor dies the case changes, and the creditor becomes quasi a *cestui que trust*. Such a general promise is not like a grain receipt for grain in a certain bin; it remains a merely personal undertaking, and "imposes no higher legal obligation upon the debtor than his promise of payment, involved in the contracting of the debt." *Forbes v. Howe*, 102 Mass. 427, 435. *Holmes v. Winchester*, 135 Mass. 299, 303. Granting this, there can be no question that the other elements of a preference are made out.

Again, the bills of sale would not bind the company until they were ratified by the directors on May 22. *England v. Dearborn*, 141 Mass. 590. If we are to assume that the ratification was not conditional upon the assignment for the benefit of creditors going through, which it failed to do, still it would seem that the validity of the bills of sale must be tested as of that date rather than May 10, so that the elements of distance between promise and performance and of knowledge of the company's insolvency become more pronounced. See *Whiting v. Massachusetts Ins. Co.* 129 Mass. 240, 241, *ad fin.*; *Emery v. Boston Terminal Co.*, *ante*, 172.

Again, there is no question that, independently of what we have said concerning the ostensible or chief purpose of the bills of sale, they were preferences in so far as they secured the ledger accounts of Mr. and Mrs. Marston. "If any part of the purpose of the sale or conveyance was fraudulent the whole was void." *Crafts v. Belden*, 99 Mass. 535, 539.

Again, although this was not the ground of the bill, the bills of sale were recorded as such, but this did not answer the re-

quirement of the statute as to mortgages. *Williams v. Nichols*, 121 Mass. 435. On the other hand probably it would be impossible for the Marstons to make out that they kept or even took possession of the goods. Privately putting a hand on some of them while in the possession of another, or fastening tags on a few, without more, probably would be found to have left the previous possession undisturbed.

It is not necessary to go further to show that the plaintiffs are entitled to recover. The details of the decree must be settled in the Superior Court.

Decree for the plaintiffs.

E. N. Hill, for the plaintiffs.

S. Lincoln & S. Robinson, for the defendant Bell, an attaching creditor.

W. C. Wait, for the defendants Marston, submitted the case on a brief.

BARTHOLOMEW SCANNELL & another *vs.* HUB BREWING COMPANY.

Suffolk. January 25, 1901. — March 2, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

One who files a petition to enforce a mechanic's lien, under an entire contract to perform and furnish certain labor and materials for a round sum, on which a payment on account has been made, and who in his petition credits one half of the payment upon the sum due to him for labor and the other half upon the sum due for materials, may be allowed to amend his petition by crediting the whole amount of the payment upon the sum due for materials and claiming the whole amount due to him for labor without deduction, the statement in his petition being a narration which can be corrected, and not an offer or an appropriation. The petitioner's understatement of his claim for labor, subsequently corrected, comes within the provision of § 8 of Pub. Sts. c. 191, that the validity of the lien shall not be affected by an inaccuracy, not wilful, in stating the amount due for labor or materials.

A mechanic's lien may be established for labor performed in making, under an entire contract for a round sum, the apparatus and appliances for a brewery, to be inserted in the building and connected together by pipes, although part of the labor was performed in the petitioner's shop in another city, and the final connecting of the various appliances by pipes in the brewery may have been done by persons other than the petitioner.

PETITION to establish a mechanic's lien upon the respondent's brewery and the land on which it stands, at Roxbury in Boston, to secure payment of a claim of \$5,663.02, with interest thereon, alleged to be due for labor and materials performed and furnished in the erection of said brewery from April 28 to November 8, 1898, inclusive, filed February 6, 1899.

At the trial in the Superior Court, before *Bond, J.*, the following facts appeared: The labor and materials were furnished under an entire contract between the petitioners and one Adolph Segal. The respondent admitted that said Segal had authority from and rightfully was acting for the respondent in procuring from the petitioners such labor and materials, and that they fully performed said contract.

The contract began as follows:

"That the parties of the second part [Scannell & Wholey of Lowell], for and in consideration of the hereinafter stipulated sum, agree to furnish, deliver and erect for the party of the first part [Adolph Segal] in the new brewery of the Hub Brewing Company, located in the said city of Boston, Three Horizontal Return Tubular Boilers set up in brick work with all pipe connections, and built as described in the specifications bearing date of March 10, 1898; also all the Tank Work, Bins, Hoppers; etc., embracing the Hop-Jack, Mash Tub, Collecting Tank, Malt Scale Hopper, Meal Scale Hopper, Hopper for Cyclone Dust Collector, Twin Bin for Rice and Ground Malt, and Receiving Bin for Malt Storage Elevator, all as described in specifications bearing date of March 10, 1898, and as shown on the drawings referring thereto. . . . All materials and workmanship to be of the very best, complete in every particular, and be furnished and paid for by the parties of the second part. . . ."

The provision as to the contract price was as follows:

"For and in consideration of the true and faithful performance of all the work herein contracted for, the party of the first part agrees to pay unto the parties of the second part the net sum of eight thousand three hundred dollars (\$8,300)."

It was shown by the petitioners that the formalities required by statute were complied with by them; that the value of the labor performed and furnished by them under the contract at and for the brewery of the respondent, on and before November

8, 1898, was, as alleged, \$5,663.02; that the entire contract price for labor and materials was \$8,300; that \$2,000 was paid upon the contract in two payments of \$1,000 each; that, before the commencement of legal proceedings to perfect and enforce the lien of the petitioners, no division was made of the \$2,000, but the entire sum was paid, received and credited upon the contract, without distinguishing between labor and materials; that, in their lien statement and original petition, \$1,000 thereof was credited upon the labor and \$1,000 upon the materials, and that this was done through misapprehension of their rights, while they were proceeding to perfect and enforce an existing claim of lien, and not till then, and without any intention of waiving any rights in the premises. The original petition alleged that the amount remaining due for labor was \$4,663.02. Before the trial of the case, the petitioners called up their amendment, filed February 16, 1899, increasing the amount claimed to \$5,663.02, and due notice thereof was given to the sureties on the bond given by the respondent on May 29, 1899, to dissolve the lien. The judge, after hearing the respondent and the sureties as to the allowance of such amendment, allowed the same against the objection and exception of the respondent and the sureties, the judge ruling and finding that the amendment introduced no new cause of action.

The judge further ruled, that if the petitioners, in commencing legal proceedings to perfect and enforce an existing lien for the labor performed and furnished by them, incorrectly alleged in the lien statement and original petition the amount due them for labor, calling it less than it really was, owing to a mistake on their part as to the proper way of appropriating the payments, the validity of their lien for the true amount due for labor would not be affected thereby, if the petition was duly amended.

It was shown by the petitioners that all the labor performed and furnished by them was performed and furnished either on the respondent's premises, or in preparation therefor, but did not show how much labor was performed on any particular part of the work; that the labor from April 28 to July 6, 1898, was performed and furnished at the works of the petitioners at Lowell, Mass., and was employed in preparing material which

was intended for use in and actually used in the construction of the brewery; that the labor from July 6 to November 8, 1898, inclusive, was nearly all performed upon the premises of the respondent, but just how much was performed at Lowell and how much on the premises was not definitely shown, the account of the work at both places on each day under said contract being kept as one account in the petitioners' books.

The petitioners contended on the evidence that the work and materials performed and furnished by them were all so placed and connected with the brewery by the petitioners, for such a purpose, with such adaptations for pipe connections and otherwise, and with such effect, that they became permanent fixtures and part of the realty, and could not be removed without great difficulty and expense, and without serious injury to themselves and the building.

The respondent contended that such work and materials resulted in the making of articles of personal property not structurally connected with the brewery building, and that no lien therefor was maintainable. Evidence was introduced upon this subject.

On all the evidence the judge found that the materials furnished by the petitioners were so annexed to and connected with the realty that the petitioners were entitled to a lien for the labor performed thereon and in placing the materials in the building and in making the connections of the same to the building, and found that the lien for the amount claimed as due for labor, with interest from the date of the filing of the petition, was established.

The respondent asked for certain rulings, which the judge declined to give; and the respondent alleged exceptions. The questions of law raised by the exceptions are stated in the opinion of the court.

R. W. Nason, for the respondent.

C. H. Conant, for the petitioners.

HOLMES, C. J. This is a petition to establish a lien for labor furnished under an entire contract for labor and material made with one Segal by the respondent's consent. Pub. Sts. c. 191, § 2. The entire contract price was \$8,300. The value of the

labor was \$5,663.02. There had been paid generally upon the contract \$2,000 before the beginning of proceedings to assert their lien by the petitioners, and in the statement of their account and in their petition as originally filed, half this sum was credited upon the amount due for labor. At the trial the petitioners were allowed to amend their petition by striking out this credit of \$1,000, and claiming the whole value of the labor as above stated. This was excepted to. And although the only exception before us is that of the respondent, (Pub. Sts. c. 167, § 85, *Driscoll v. Holt*, 170 Mass. 262,) we are content to assume for the purposes of decision that the question intended to be raised is open one way or another under the bill.

The respondent treats the credit as an appropriation of payments. Under an entire contract of course there is no such thing as an appropriation of payments to particular items of the entirety. But assuming that such an appropriation would be possible after it became material to discriminate, it could not be done by the creditor alone after the payment had been made. Moreover a pleading as such does not purport to be an appropriation. It purports to state the supposed effect of past transactions. It, and the statement of the account as well, is a narrative, not an offer. When found to be mistaken, it properly may be amended. The inaccuracy in the statement was within the saving of the statute. Pub. Sts. c. 191, § 8.

In fact the part payment had no effect upon the petitioners' rights. All that it did was to diminish the amount of the contract debt unpaid. The lien could not be enforced beyond, but it could be enforced up to that amount, and as the amount unpaid exceeded the total claim for labor the lien was unaffected. *Casey v. Weaver*, 141 Mass. 280. In *Driscoll v. Hill*, 11 Allen, 154, decided under an earlier state of legislation, the contract was said not to have been entire, and it did not appear what part of a general payment was attributable to the debt for labor. The petitioners were right in their law, and the amendment properly was allowed. *Burrell v. Way*, 176 Mass. 164.

The labor was done under an agreement to "furnish, deliver and erect," in the respondent's brewery in Boston, boilers "set up in brickwork, with all pipe connections"; "also all the Tank work, Bins, Hoppers etc., embracing the Hop-Jack, Mash Tub,

Collecting Tank, Malt Scale Hopper, Meal Scale Hopper, Hopper for Cyclone Dust Collector, Twin Bin for Rice and Ground Malt, and Receiving Bin for Malt Storage Elevator," according to specifications. Part of the work was done at the petitioners' works in Lowell in preparing material to be used in the construction of the brewery. It did not appear how much labor was spent on any particular part of this work, and the respondent contends that therefore if the lien fails for any portion of the labor it fails altogether, and that it must fail in part because some of the enumerated articles were personalty, so that work spent upon them was not furnished in the erection of a structure upon real estate within Pub. Sts. c. 192, §1. The question was raised by requests for rulings that the hop-jack, malt scale hopper, meal scale hopper, and the cyclone dust collector were personal property, etc. The court found that all the articles were so annexed to and connected with the realty that the petitioners were entitled to a lien for the labor performed upon them, and refused the requests. The judge also refused to rule that the petitioners could not recover for work done at Lowell upon the boilers, tanks and sheet iron work.

Whatever test be adopted to decide whether labor is performed in the erection of a building, *Boston Furnace Co. v. Dimock*, 158 Mass. 552, the judge, to say the least, was warranted in finding that the labor furnished by the petitioners satisfied the test. All the different objects mentioned were parts of the brewing apparatus which, presumably at least, the shell of the building was erected to receive. They were the point and object of putting up the walls and floors. There was testimony that most of them were riveted to the building directly or indirectly, and that they all were connected together by pipes. They were built up in the building and could not be got out except by taking them to pieces, which would seem from the testimony of the respondent's witnesses to be commercially impracticable. "It would be far cheaper to get new ones." If any object was more movable than the others, it none the less was an integral part of one original whole, which as a whole was a building and real estate. Whether they were connected by the petitioners or by others, the petitioners' contract and their work contemplated that the connection would be made, and the petitioners' contract

was not performed until the objects were irrevocably within the building and manifestly on their way at least to become a part of it.

The consideration last mentioned shows that the different articles do not encounter the difficulty dealt with in *Tracy v. Wetherell*, 165 Mass. 113. From the point of view of the mechanics' lien law the contract was not merely a contract for the sale of a chattel which the petitioners might or might not make themselves and the respondent might use where it chose. The objects furnished were made, and presumably had to be made, by the petitioners, and with special reference to the particular place. No doubt, generically, they were objects well known in the brewery business, but, as they were furnished according to minute specifications and drawings, the natural inference is that their particular form and details rendered it necessary to make them from the beginning in order to meet the requirements. Indeed, it is said in the specifications of the contract that "all the . . . labor of every kind required for the construction, erection and proper finishing of the work . . . must be furnished by" the petitioners. After their parts were made and fitted the tanks, bins, etc. had to be constructed in the building. They were practically irremovable when constructed, and, whether connected with the building by the petitioners or by others and before or after the petitioners had finished their part of the work, were put where they were for the purpose of being connected, and either way equally were furnished for a part of the building into which they were incorporated. *Turner v. Wentworth*, 119 Mass. 459. As the labor in Lowell was contemplated by the contract and was a necessary step to the making of their final addition to the building by the petitioners, it is within the security of the lien. *Wilson v. Sleeper*, 131 Mass. 177, 179. *Daley v. Legate*, 169 Mass. 257. It seems unnecessary to cite further authority or to go more into detail to show that the exceptions cannot be sustained. See *Allen v. Mooney*, 130 Mass. 155; *Hopewell Mills v. Taunton Savings Bank*, 150 Mass. 519, 522.

Exceptions overruled.

LEA COTE vs. LAWRENCE MANUFACTURING COMPANY.

Middlesex. January 25, 1901. — March 2, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, & BARKER, JJ.

In an action by the widow of a workman in a cotton mill to recover for his instantaneous death, caused by being struck by a plank thrown down a dust chimney of the mill, it appeared that the chimney was built with large openings at the bottom into the basement of the mill for the purpose of drawing up and discharging at its top particles of cotton waste and dust. It contained an iron ladder from the bottom to the top and at intervals iron platforms on which were laid planks, the platforms being used by workmen when going up the chimney to sweep down particles of cotton adhering to its sides. There being a fire in this chimney, a workman, sent up the ladder to put it out, threw down two planks which were on fire, and when asked by the defendant's superintendent why he did so, replied that it was easier to put out the fire that way, whereupon the superintendent said "All right." A few hours later another fire broke out in the chimney, and the superintendent called and led the plaintiff's husband with other workmen into the bottom of the chimney where they stood near an alcove which was an enlargement of the bottom of the chimney and had a roof. The superintendent again sent up the ladder the same man who had put out the other fire and thrown down the planks. He threw down another plank which he thought was on fire, which struck and killed the plaintiff's husband, who did not know about the planks being thrown down at the previous fire. He was standing a little inside of the chimney. Before the last plank was thrown down the superintendent had left the place without giving the plaintiff's husband any warning. The workman who threw down the plank testified, that he cried out to warn those below when he did so. The superintendent testified that he expected the workman on the ladder would throw down any planks that were on fire. *Held*, that a verdict for the plaintiff was warranted by the evidence, there being evidence on which the jury might find that the deceased had no notice of the special danger of planks being thrown down and had a right to suppose that the chimney was a safe place, and that there was evidence on which the jury might find that the defendant's superintendent was negligent in knowing the danger and calling on the plaintiff to enter the chimney without warning him of it. The superintendent had no right to assume that the deceased would look out for himself, as the danger was not apparent. The falling of burning cotton waste, which the deceased might have anticipated, would be harmless.

TORT by the widow of Remi Cote under St. 1887, c. 270, as amended by St. 1894, c. 499, to recover for the instantaneous death of her husband, an employee of the defendant, from being struck by a plank thrown down a dust chimney in the defendant's mill. Writ dated May 19, 1900.

At the trial in the Superior Court, before *Maynard, J.*, the following facts among others appeared from the evidence: The

plaintiff's husband was a common laborer employed by the defendant in its cotton mills at Lowell, where he had worked for about two years. He was instantly killed and died without conscious suffering on April 6, 1900, under the following circumstances:

The deceased belonged to that division of the defendant's employees known as the "yard hands," whose duties were to unload coal, move cars, handle cotton and perform other services of that kind. Connected with one of the mills of the defendant were two "dust chimneys" so called. On the lower floor of the mill where the accident occurred was what is called a picker room in which is carried on the operation of picking and separating the cotton. In this operation particles of cotton and dust are thrown off into the air, and in order to remove these particles of cotton and dust the following means are employed. Under the picker room and situated on the ground floor is a cellar or basement room, and opening into this room are numerous holes in the floor of the room above. At one side of the basement room are two large chimneys some twelve feet wide at the bottom, eight or ten feet wide at the top and from fifty to sixty feet high, with large openings at the bottom communicating with the cellar or basement before described. The situation and structure of the chimneys are such that they create a strong draft upward tending to draw particles of cotton and dust from the cellar and carry them off into the outer air. The particles of cotton and dust set free in the operation of picking the cotton in the picker room are forced through the holes in the floor from the picker room to the cellar as above described by fans or blowers connected with the machinery used in carrying on the operations in the picker room. Inside of each of the two chimneys before mentioned and attached to one side thereof was a ladder reaching from the bottom to the top, and at intervals of twelve or fifteen feet platforms were carried from the ladder to the other side of the chimney. The ladders and platforms were made of iron, but upon the platforms were placed planks from ten to twelve feet long, from a foot to fourteen inches wide, and from an inch to an inch and a half thick. The ladders and platforms were used by workmen who sometimes went up the chimneys to sweep down particles of cotton adhering to the sides.

On the day of the accident the particles of cotton collected in the basement room before mentioned caught fire, and the men connected with the yard gang were called upon to extinguish the fire, which they did by the use of the hose and by sweeping up the particles of cotton and removing them in barrels. Among the men thus employed was Remi Cote, the deceased, and most of the other witnesses. When the fire was practically extinguished in the basement room, it was discovered that there was fire in one of the chimneys, and Matthot and Fortin, two of the witnesses, were sent by the superintendent to extinguish the fire in the chimney. Matthot went up the iron ladder and, when quite a distance up, observed that some of the planks forming one of the platforms above described were on fire. Fortin, who remained at the bottom of the chimney, told Matthot to throw down the planks which were on fire as it would be easier to extinguish them in that way. Matthot threw down two planks, and the fire being extinguished, as he supposed, came down the ladder to the bottom of the chimney. After the planks had been thrown down, Hunt, the superintendent, came along and said to Fortin, "Why did you throw down the planks?" and Fortin answered, "It is easier to put out the fire that way," and the superintendent said, "All right." When Matthot came down Fortin told him what the superintendent had said about throwing down planks. Remi Cote, the deceased, came into the chimney before Matthot went up, was then sent away by Fortin to get a barrel, and did not come back into the chimney until Matthot had come down after throwing down the planks, and did not know that any planks had been thrown down. It was supposed that the fire in the chimney was extinguished, and the men went away, but Matthot was left to watch. This was about three o'clock in the afternoon. About fifteen minutes before six the yard hands, including the deceased and the witnesses in the case, excepting Fortin, were collected under the shed where they were accustomed to collect to wait for orders, when Hunt, the superintendent, came along and said in substance, "There is another fire down in number ten, and you must go down and help Matthot," and he led them down and into the bottom of the chimney. When they arrived there Matthot was there, and the cotton adhering to

the sides in the upper part of the chimney was on fire. Hunt told Matthot to go up the ladder, and gave him a broom to sweep down the particles of cotton that were on fire, and he then went away and did not return until after the accident. He gave no orders to the men what to do, and did not tell them where to stand. He testified on cross-examination that he expected Matthot to throw down any planks that were on fire. At the bottom of the chimney there was on one side an alcove connected with one side of the bottom of the chimney. This alcove was in effect merely an enlargement of the bottom of the chimney, but it had a roof nearly at right angles with the side of the chimney. One of the men stood under this roof, and the rest stood within the chimney proper, when Matthot went up and the superintendent went away. When Matthot had gone up the ladder about forty feet, he discovered that one of the planks forming the platform was on fire, or thought that it was, and threw it down, testifying that, when he did so, he cried out twice and told them to be careful at the bottom. It struck Remi Cote and another man by the name of Desmarais. Cote was instantly killed and Desmarais badly injured. Desmarais was in the employ of the defendant at the time of the trial and was present in court but was not called as a witness. It was admitted that Cote was instantly killed and died without conscious suffering, and that proper notice was given to the defendant, and also that Hunt was the superintendent of the defendant within the meaning of the statute.

During the course of the trial, thirteen exceptions were taken by the defendant, five of which were to the admission of evidence, five to the refusal of the judge to rule as requested and to direct a verdict for the defendant, and three to instructions given by the judge. The questions raised by these exceptions are stated in the opinion of the court.

The jury returned a verdict for the plaintiff in the sum of \$2,250; and the defendant alleged exceptions.

G. F. Richardson, (*G. R. Richardson* with him,) for the defendant.

W. H. Bent, for the plaintiff.

HOLMES, C. J. This is an action brought under St. 1887, c. 270, and St. 1894, c. 499, by the widow of one Remi Cote, to

recover for his having been instantaneously killed by reason of the negligence of a superintendent. According to the plaintiff's evidence the facts were these. There had been a fire in a dust chimney in the afternoon. To put it out a man by the name of Matthot had climbed a ladder inside the chimney, and among other things had thrown down two boards from one of the platforms which projected at regular intervals into the chimney. This the deceased did not know. The superintendent saw that the boards had fallen, and asked one Fortin, who seems to have exercised some little official or unofficial authority over Matthot, why they threw the plank down. Fortin gave some reasons and his superintendent answered "All right." This Fortin told Matthot. Some hours later fire broke out again in the chimney, and the superintendent sent Cote and other men to the place. They went there with the superintendent and stood under a little shed at the mouth of the chimney, waiting for orders. Matthot again went up the ladder and threw down another plank which he thought was burning. The superintendent expected that he would do so, if he thought that a plank was on fire. Cote had got a little inside the chimney and was killed. The case is here on exceptions to a refusal to take the case from the jury.

It is argued that the deceased did not use due care. Undoubtedly the jury would have had sufficient warrant for finding so, on the evidence, but it could not be ruled as matter of law. He did not know that boards had been thrown down. He was directed in terms by the superintendent to go to a place separated from the place where he was killed only by the invisible line between the inside and the outside of the chimney. Under their instructions the jury must have found that he reasonably understood that it was his duty to go into the chimney. Indeed, it rather looks as if the superintendent saw him there before leaving the place. We cannot say that the jury were not warranted in finding that the deceased had no notice of the special danger of boards being thrown down, and had a right to suppose that the chimney was a safe place.

As to the negligence of the superintendent he naturally understood, and he says that he did, that Matthot would throw down planks if they seemed to be on fire. He led the deceased to the

place. We must take it that his orders reasonably would have been understood to call on Cote to enter the chimney. He knew the danger and gave no warning. We cannot say that the danger was apparent, or that the superintendent had a right to assume that Cote would look out for himself. The only thing which it was entirely plain might come down was light, burning cotton waste, which would do no harm.

It is said that if Matthot, Cote's fellow servant, did not give warning, the death was due to his negligence, not to that of the superintendent, and that if he gave the warning to which he testified, then neither he nor the superintendent was negligent. But the jury might have found that Matthot did all that he had any reason to suppose that he ought to do, that Cote received no warning, and that the superintendent, knowing all the facts, ought to have seen that he was warned.

The evidence as to what the superintendent expected Matthot to do was evidence under the circumstances of what was the reasonable interpretation of the order setting him to work.

We have dealt with all the exceptions which were argued and have examined the others. We see no ground for disturbing the verdict.

Exceptions overruled.

LORING N. FARNUM vs. HAVERHILL AND ANDOVER STREET RAILWAY COMPANY.

Suffolk. January 25, 1901. — March 2, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

The statutes of this Commonwealth permit the construction of street railways in part through private lands with the consent of the owners or when the lands are acquired by purchase, if all other requirements are complied with.

BILL IN EQUITY by a stockholder of the defendant to restrain it from constructing tracks outside the limits of the highways of the Commonwealth, filed November 1, 1900.

The case was heard in the Superior Court, by *Fessenden, J.*, who reserved it on the bill and answer and agreed facts for the

consideration of the full court, such decree to be entered as justice and equity might require.

The agreed facts were as follows: "First. It is agreed that Loring N. Farnum, of Boston, county of Suffolk and Commonwealth of Massachusetts, was a subscriber for ten shares of the capital stock of the Haverhill and Andover Street Railway Company, and that the Haverhill and Andover Street Railway Company is a corporation duly organized under the laws of the Commonwealth of Massachusetts, by charter dated October 23, A. D. 1900. And that the said corporation has a location or franchise to lay its tracks in certain streets or highways of the towns of Andover and North Andover, both in the county of Essex, Commonwealth aforesaid, and that the said locations have been duly accepted by the said Haverhill and Andover Street Railway Company.

"Second. It is agreed that the Haverhill and Andover Street Railway Company through its proper officers contemplate building, and have taken preliminary measures to build, a certain section of track outside the limits of the highways of the Commonwealth of Massachusetts, to wit: that beginning at a point on the northwesterly side of Elm street in the town of Andover, at or about the house of Plato Eames so called, and running in a northwesterly direction over the land of private individuals for a certain great distance, to wit, about one half mile to a road or street in Andover known as the old railroad track, and being a continuation of High Street, so called, in Andover aforesaid.

"Third. It is agreed that the Haverhill and Andover Street Railway Company, through its proper officials, intend to purchase from private individuals, and have taken preliminary steps to accomplish such purchase with the funds of the corporation, the fee simple in lands over which the tracks of the Haverhill and Andover Street Railway Company are to be laid outside of the limits of the highways of the said town of Andover as above set forth.

"Fourth. It is agreed that the Haverhill and Andover Street Railway Company is duly and lawfully organized under the general street railway law of the Commonwealth of Massachusetts, and has no grant from the Legislature of the Commonwealth of

Massachusetts authorizing it to operate its road or tracks outside the limits of the highways of this Commonwealth."

W. Odlin, for the plaintiff.

E. B. Fuller, for the defendant.

KNOWLTON, J. The only question in this case is whether a street railway company, organized under the general laws of this Commonwealth, can build its tracks and run its cars over land acquired by purchase outside of the limits of the streets or highways. This question is not directly answered by the statutes, and it never has been considered by this court.

The definitions of the words "street railway" given by the St. 1874, c. 372, § 2, and the Pub. Sts. c. 112, § 1, throw no light on the question. The definition in the St. 1898, c. 578, § 1, which is given for the construction of that act, mentions only railways "constructed on, in, under or above the public highways or streets"; but it is obvious that it was not intended to exclude railways constructed in part over private lands, for the statute contains many provisions in regard to taxation and other matters which plainly are applicable to street railways generally, as well those running in part over private lands as others. In various places it requires returns of the length of track operated in public ways, thus recognizing the possibility of there being tracks operated in places which are not public ways. At the time of the passage of this act there were many street railways in the Commonwealth that operated such tracks under express legislative authority contained in their charters or in other special statutes.

There is nothing in the policy of the Commonwealth against the operation of street railways in part across private lands acquired by purchase. This is shown in the large number of charters or other statutes expressly permitting it, to which we have referred. Moreover, a street railway may "purchase and hold such real and personal estate as may be necessary or convenient for the operation of its road." Pub. Sts. c. 113, § 18. The statute expressly prohibiting the laying of a street railway in a public park implies that, except when prohibited, a street railway may be laid outside of public ways. Pub. Sts. c. 54, § 13. St. 1882, c. 154, § 10.

Under the St. 1898, c. 404, a right is given to street railways

to take lands outside of public ways in the exercise of the right of eminent domain, for the purpose of avoiding or eliminating a crossing of a railroad by its railway at grade. Section 5 of this statute is a general provision making street railway companies subject to the provisions of general laws as to the equipment, use and operation of their railways in parts outside of the limits of public ways, as well as in such ways. In view of the existence of many railways having locations in part outside of public ways, we are of opinion that the application of this section was intended to be general, and not to be limited to locations made under this statute.

Undoubtedly street railways under our statutes are intended to be located and used in the public streets, and they cannot be operated without a location approved by the local authorities. A location through the public streets, connected in any place with a track running through private lands, will not be likely to be approved by the authorities, unless the general arrangement of the course is such as the public convenience requires.

We are of opinion that the statutes permit the construction of street railways in part through private lands with the consent of the owners, or when the lands are acquired by purchase, if all other requirements are complied with. Such was the opinion of the railroad commissioners expressed in *Wareham v. Onset Bay Grove Association*, R. R. Com. Rep. January, 1887, 112, 114. A similar statute has been so construed in Pennsylvania. *Pennsylvania Railroad v. Glenwood & Dravosburg Electric Street Railway*, 184 Penn. St. 227. *Pennsylvania Railroad v. Greensburg, Jeannette & Pittsburg Street Railway*, 176 Penn. St. 559. *Rahn Township v. Tamaqua & Lansford Street Railway*, 167 Penn. St. 84.

Bill dismissed.

LORD ELECTRIC COMPANY vs. CHARLES F. MORRILL.

Suffolk. January 14, 1901. — March 5, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Conversations over a telephone otherwise admissible may be admitted in evidence, where the witness testifies that he recognized the voice of the person with whom he was talking.

The admission of immaterial evidence will not sustain an exception, where the excepting party in no way could have been harmed by it.

A variance between the statement of a contract in an account annexed and its proof at the trial, which does not affect the amount claimed, and the correction of which would not have changed the course of the trial, and which was not called to the attention of the presiding judge or of the plaintiff's counsel, cannot be the ground of an exception.

CONTRACT on an account annexed against the lessee for twenty-five years of the Jewelers Building, so called, on the corner of Washington and Bromfield Streets in Boston, to recover for putting in additional electric lights and wires not included in a written contract between the plaintiff and the trustees of that building. Writ dated July 19, 1899.

At the trial in the Superior Court, before *Sheldon, J.*, one Driscoll, a witness for the plaintiff, testified that he was the plaintiff's bookkeeper, and that he remembered having a conversation over the telephone with the defendant. He was then asked by the plaintiff, what the conversation was. The defendant objected to the evidence, whereupon the judge asked the witness "Do you know it was Mr. Morrill?" and the witness answered "Well, I was quite familiar with his voice and I recognized it as such." The judge then admitted the conversation and the defendant excepted.

It appeared that the first floor and basement of the Jewelers Building were sublet by the defendant to one Marsh, the treasurer and general manager of a lunch room called the "Bromfield Spa." The plaintiff's charge for extra work amounted to \$800, of which \$300 had been paid or was to be paid by Marsh and \$250 by the trustees of the building, and this suit was to recover the balance of \$250 from the defendant, who, the plain-

tiff's witnesses testified, had agreed to pay it. The defendant denied that he had so agreed. During the trial the defendant moved to amend his answer by setting up the statute of frauds, and it was agreed that he should have the same right to maintain any defence under the statute of frauds as if he had pleaded it. The additional lights and wires were put in on the first floor and basement occupied by the Bromfield Spa, and the defendant contended that they were all ordered by Marsh and that therefore, if the defendant orally promised to pay \$250 of the expense, it was a promise to pay the debt of another, and that the plaintiff could not recover without a written memorandum of the promise signed by the defendant.

At the close of the evidence, the defendant requested the judge to instruct the jury that upon the pleadings and the evidence the plaintiff could not recover. The judge refused so to rule, and the defendant excepted.

The judge, among other instructions, instructed the jury as follows:

"Now, the plaintiff's contention is that under these circumstances they had begun to do this extra work and supply this extra material, but they found that they could not hold anybody to pay for it, so they said in substance, 'Very well, then we will put in no extra work,' and the plaintiff says that under those circumstances there was an arrangement come to between the plaintiff and each of the other three parties by which the plaintiff reduced its price for this extra supply that was needed from \$1,000 to \$800, and the Bromfield Spa agreed to pay \$300 of that, and that the trustees, Mr. Dana and Mr. Wells, agreed to pay \$250 of it, and that thereupon the plaintiff said in substance, I am not using the words again, 'Under those circumstances, under those separate promises that you three sets of people make, we will go on and will finish this,' and they say that under that agreement, and relying on that agreement, they went on and finished it, and, accordingly, they bring suit for \$800, giving credit for the \$250 which has been paid by the trustees, for the \$300 which has either been or agreed to be paid, it does not make any difference which, if it was agreed, by the Bromfield Spa, and for the balance of \$250 which they say this defendant agreed to pay. . . .

“ Well, gentlemen, all those considerations are for you. It is not for me to judge of the weight of it. It is true that if the plaintiff made the contract with Marsh, or with Wells and Dana, the trustees, or with any other person except the defendant, and did not have the contract, which I have told you the plaintiff claims it had, to which the defendant was a party, for the doing of the work and furnishing the materials declared on, and if the plaintiff did such work and furnished such material, and performed such labor, pursuant to a contract made with any other person than the defendant, and did not do it under the contract to which the defendant was a party, which the plaintiff relies on, then the plaintiff cannot recover, then the plaintiff cannot hold Mr. Morrill if the plaintiff did not have an agreement with Mr. Morrill by which he was to pay this amount; but if the plaintiff did have that agreement with Mr. Morrill, then Mr. Morrill is bound by it.

“ Now, the plaintiff says that Mr. Dana also testified — Mr. Dana did testify upon the subject unquestionably — that in a subsequent conversation Mr. Morrill said in substance, I am not using the language, ‘ I may have made an oral promise, but I am not legally bound by it, and I won’t pay it,’ and all parties agree Mr. Morrill did subsequently refuse to pay anything.”

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

C. W. Rowley, for the defendant.

J. M. Hallowell, for the plaintiff.

MORTON, J. This is an action to recover of the defendant his share of the expense of certain electrical work done by the plaintiff in a building called the Jewelers Building on the corner of Washington and Bromfield Streets in Boston. There was a verdict for the plaintiff, and the case is here on the defendant’s exceptions to the refusal of the court to rule that on the pleadings and evidence the plaintiff was not entitled to recover, to the admission of a conversation over the telephone with the defendant, and to the judge’s charge.

1. As to the conversation over the telephone, the witness testified that he recognized the defendant’s voice. This was sufficient evidence of identity to justify the court in admitting the evidence. The conversation does not seem to have been

material, but we see no way in which the defendant could have been harmed by it.

2. The only matter to which the attention of the court appears to have been called in connection with the ruling that was asked that the action could not be maintained on the pleadings and evidence was the statute of frauds. But there was evidence which justified the jury in finding, as they must have found under the instructions of the court, that the undertaking was an original undertaking on the part of the defendant and not a promise to answer for the debt of another. The defendant now contends further that the declaration counts on his liability for the whole amount of the expense with credits for the amounts paid by Marsh and by Wells and Dana trustees rather than on his liability for a fixed and certain sum as a part of the whole expense which was what the plaintiff's evidence tended to show was the case. The defendant therefore contends in substance that there was a variance between the declaration and the proof. It does not appear from the exceptions that this aspect of the ruling that was asked for was called in any way to the attention of the court. It is fair to assume from the charge that it was not. The manner in which the plaintiff's contention and what it was necessary for it to prove were stated would seem to show almost conclusively that it could not have been. The amount for which the plaintiff seeks to hold the defendant is the same in either case. If the matter had been called to the attention of the court or of counsel the objection could have been readily removed by amendment. There is no suggestion that the evidence or the course of the trial would have been any different. It does not seem to us that the exceptions should be sustained on this ground.

3. The remaining exception relates to the charge. The defendant's objections as we understand them are first that the charge assumed that there was evidence that the plaintiff relied on the defendant's promise when there was none and was therefore a charge upon a matter of fact, and second that it was not sufficiently full in regard to the statute of frauds. It is clear that there was evidence that the plaintiff relied on the defendant's promise and the court did no more than state, as it was proper and right that it should do, the contentions of the parties and

explain the law applicable thereto. The defendant has not called our attention to anything which the court said that it ought not to have said in regard to the statute of frauds or to anything that it did not say that it ought to have said, and we think that the charge was sufficient.

Exceptions overruled.

META H. NICKERSON *vs.* MASSACHUSETTS TITLE INSURANCE COMPANY.

Suffolk. December 5, 6, 1900. — March 6, 1901.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

A title company employed by a savings bank to examine the title to a certain lot of land and to draw the papers for a mortgage upon it, did so, and represented that the title was clear and unencumbered, and in reliance on this representation the bank made the loan, the title company drawing the mortgage. There was a prior mortgage which was held by the title company, the existence of which without intent to deceive it negligently failed to disclose. Subsequently the savings bank foreclosed its mortgage, and the receivers of the bank conveyed the land by a quitclaim deed to a purchaser, who had notice of the existence of the prior mortgage in the hands of the title company. In a suit in equity brought by such purchaser against the title company, to restrain it from enforcing its prior mortgage, it was *held*, that the bill could be maintained, as the title company owed the savings bank the duty of using due care, to ascertain and report all encumbrances on the land, and, by its negligence having failed to do so, was estopped from setting up its prior mortgage. *Held, also*, that the fact that the plaintiff was a grantee under a quitclaim deed having full knowledge of the facts did not prevent him from enforcing the estoppel; that the savings bank had the election of suing the title company in tort for negligence or of bringing a suit in equity founded on the defendant's estoppel, to enjoin it from setting up the encumbrance, and having elected to rely on the estoppel, could pass the right to a purchaser, who could enforce it in his own name.

One who has a clear title by estoppel can convey his rights to any one, and the knowledge or ignorance of the purchaser is immaterial.

One employed as an attorney to draw an instrument cannot take advantage of a claim founded on a statement surreptitiously inserted by him in the instrument to the prejudice of his employer, which is true in fact but which he is estopped by his former conduct from setting up.

BILL IN EQUITY by the owner of lot 399 on a plan of lands in that part of Newton called Waban, praying that the defendant be decreed to be estopped from enforcing a mortgage for \$905.56, dated May 3, and recorded May 29, 1890, given by

Jacob L. Hano to Arnold A. Rand, trustee, and held by the defendant by assignment, filed December 16, 1899.

At the hearing in the Superior Court, before *Bell*, J., it was admitted that the plaintiff was the owner of the equity of redemption of lot 399 under a quitclaim deed from the receivers of the Framingham Savings Bank and that she had notice of the existence of the first mortgage of May 3, 1890, for \$905.56, held by the defendant, before she took her deed of the property from the receivers.

The judge found the following facts :

" This mortgage [of May 3, 1890, from Jacob L. Hano] was assigned by Arnold A. Rand, trustee, to Samuel Hano, May 25, 1890, by deed recorded May 27. As the assignment was recorded before the mortgage, it did not state the book and page of the record of the mortgage, and there was no marginal reference upon the record of the mortgage. On the same day the mortgage was assigned by Samuel Hano to the defendant. This assignment was also recorded May 27, 1890.

" Jacob L. Hano conveyed the fee to Arnold A. Rand, trustee, October 7, 1890, and Rand to James Thomas, September 3, 1891, by quitclaim deed. James Thomas mortgaged the property to the Framingham Savings Bank for \$8,000 on the same day. Neither the deed nor mortgage mentioned the mortgage of May 3, 1890.

" In this transaction the defendant acted for the bank, examined the title of the property for it, and represented it to be clear and unencumbered, and the loan was made by the bank in reliance upon that representation.

" On April 16, 1894, this Thomas mortgage was foreclosed by sale, Joseph S. Adams being the purchaser. On May 4, 1894, Adams conveyed to Frank Prescott, and on the same day Prescott conveyed this and other lots to Sylvestus L. Fillebrown, and Fillebrown gave a mortgage of this and other lots to Prescott to secure the payment of \$77,580. These four conveyances (the bank to Adams, Adams to Prescott, Prescott to Fillebrown, and Fillebrown to Prescott) were all acknowledged on May 4 and recorded on May 14, 1894.

" The mortgage of Fillebrown to Prescott was assigned to the Framingham Savings Bank by deed dated and acknowledged

May 4, but recorded June 28, 1894. These five conveyances appear to have all been parts of one transaction. The mortgage of Fillebrown to Prescott conveyed ten distinct lots which were described by metes and bounds. This lot was the second lot described. At the conclusion of the description of this lot, after a statement of some restrictions, were the words, 'subject also to a mortgage for the sum of nine hundred and five 56/100 dollars given by Jacob L. Hano to Arnold A. Rand, trustee, dated May 3, 1890, and recorded as aforesaid, Book 1977, page 367.'

"Each of the other lots conveyed was subject to restrictions or easements which were set out or referred to in connection with the descriptions. The covenants referred to the mortgage, restrictions or easements only by the added words 'except as aforesaid.'

"The defendant acted for the bank in making this Fillebrown mortgage, and drew all the deeds. This last named mortgage was foreclosed by the bank by three years' possession, expiring May 1, 1898. On May 7, 1898, the receivers of the bank conveyed to Meta H. Nickerson, the plaintiff, who is now the owner.

"I find that the bank and its officers were in fact ignorant of this mortgage, and relied upon the defendant's examination of the title, and were justified in so doing, and were not negligent, and that the defendant was during the whole time in possession of said mortgage as assignee, and that it was negligent in not disclosing the existence of said mortgage to said bank at the time of the original mortgage, and in not informing said bank of the existence of said mortgage at the time of the assignment of the Fillebrown mortgage to the bank in May, 1894."

The decree was as follows:

"1. That a writ of injunction be issued permanently restraining the defendant from further proceeding with the foreclosure sale under the mortgage referred to in the plaintiff's bill, from selling the premises therein described, from taking any steps of any nature whatever to enforce said mortgage, and from assigning or transferring said mortgage.

"2. That the defendant be, and hereby is, forever estopped and debarred from asserting any title adverse to the plaintiff or those claiming title under her, under and by virtue of said mortgage to the premises described therein.

"3. That the defendant forthwith cancel and discharge said mortgage upon the records, and surrender the original mortgage deed to the plaintiff.

"4. That the plaintiff recover her costs of suit."

From this decree the defendant appealed.

J. F. Wiggin, (*B. M. Fernald* with him,) for the defendant.

P. H. Cooney, for the plaintiff.

LORING, J. 1. The defendant's principal contention is that the plaintiff does not make out a case of an estoppel *in pais* unless she proves an intent to deceive on the part of the defendant, and that all that has been found in this case is that the defendant was negligent.

Where one employed to draw a deed omitted to insert in the deed drawn by him an encumbrance which he himself then owned, it was decided in England more than two hundred years ago that he was estopped from setting up his encumbrance against the rights which his employer obtained relying upon the deed, and that equity would enforce the estoppel and restrain him from doing so. *Draper v. Borlace*, 2 Vern. 370. It has since then been decided that, where a representation has been made by a stranger, who was under no duty to the person making the inquiry, that no encumbrance existed when he in fact had one, an estoppel was made out even though the omission to speak of the encumbrance was an innocent one arising from forgetfulness, and equity would enjoin the setting up of the encumbrance. *Burrowes v. Lock*, 10 Ves. 470. *In re Ward*, 28 Beav. 519. See also *Ibbottson v. Rhodes*, 2 Vern. 554; *Amy's case*, cited in 2 Ch. Cas. 128; *Berrisford v. Milward*, 2 Atk. 49; *Stronge v. Hawkes*, 4 De G., M. & G. 186, 194, 196; *Piggott v. Stratton*, 1 De G., F. & J. 88. And finally, in *Low v. Bouverie*, [1891] 3 Ch. 82, 100, 105, 111, in which the whole question was discussed at length, it was admitted by all the judges that where the person making the representation owed a duty to the other, an innocent omission arising from negligence would raise an estoppel.

It is enough to say that in the case at bar the defendant owed to the savings bank the duty of using due care to ascertain and report all encumbrances on the land, and it was found that it was negligent; while in *Stiff v. Ashton*, 155 Mass. 130, and the other cases relied on, the defendant was under no obliga-

tion to the plaintiff; and for that reason there is an estoppel in this case even if there is none in those cases.

2. The defendant's next contention is that, even if the savings bank had a right to have the defendant declared estopped to set up the mortgage in question, the plaintiff, as grantee of the land under a quitclaim deed, has not succeeded to that right; particularly since it appears that she bought with full knowledge of all the facts, and that a deposit has been made by the receivers of the savings bank, who sold the land to her, to pay the mortgage if she cannot enforce the estoppel. The defendant seeks to escape from *Platt v. Squire*, 12 Met. 494, by pointing out that in this case there is no extinguishment of the note secured by the Hano mortgage; the contention is that where, as in this case, the employer has an action of negligence, he does not, by conveying the land, convey the right to enforce that action. But the receivers of the savings bank not only had a right to bring an action at law to recover damages suffered from the defendant's negligence, but they also had the right to bring a suit in equity founded on the defendant's estoppel and have it enjoined from setting up the encumbrance of the Hano mortgage. *Draper v. Borlace*, and cases *supra*. They have elected to pursue the second remedy and not the first. If the right to insist upon the defendant's being postponed to them was a personal right which could be enforced by them only so long as they owned the land, and could not be transferred by them to a purchaser, it would be of little value. It is plain that if they elected to rely upon the estoppel, the right would pass to a purchaser, *Pearson v. Bailey*, 177 Mass. 318, and the purchaser could enforce it in a bill in his own name on the same principle on which it is held that the grantee of an estate, for whose benefit an agreement restricting the use of neighboring lands was made, can enforce that agreement as an equitable restriction against the owner or a grantee from the owner. The cases of *Fairfield v. McArthur*, 15 Gray, 526, and *Foster v. Wightman*, 123 Mass. 100, relied on by the defendant, are not cases where the grantee was seeking to keep what his grantor had, but cases where the grantee sought to avoid a transaction which the grantor might have avoided but had not avoided, and proceeded upon the theory that the grantor had not elected to avoid the trans-

action. See *Foster v. Wightman*, 123 Mass. 100, 101, and *Pearson v. Bailey*, *ubi supra*. In the case at bar, it directly appears from the testimony of one of the receivers, and also from the fact that the deposit already spoken of was made by them, that the real parties in interest in this action are the receivers; in this case, therefore, the receivers have elected to have the defendant estopped, and not to sue it for negligence. The fact that the plaintiff knew all the circumstances when she took her conveyance does not abridge the right which she got by transfer from one who had a clear title by estoppel. One who has a clear title by estoppel can convey his rights to any one, and the knowledge or ignorance of the purchaser from him is immaterial. A familiar application of the same principle is found in the rule that a *bona fide* purchaser for value of a note to which there would have been a defence had he not been a purchaser of it in good faith for value without notice, can convey his title to any one, even to a person who always had knowledge of the defence.

3. The defendant's next contention is wholly without merit. It is that the plaintiff now holds under a foreclosure of the Fillebrown mortgage, in which it is stated that that conveyance is made subject to the mortgage in question. But it was found by the presiding judge that this statement was inserted in the Fillebrown mortgage by the defendant, who was estopped to set up the mortgage in question, and that the defendant, when it inserted that statement in that mortgage, was acting for the Framingham Savings Bank; that it did not at that time disclose to the savings bank the existence of the mortgage in question, and that the savings bank and its officers were ignorant of it, and were not negligent. It is, therefore, a case where one employed as an attorney undertakes to set up a claim founded on a statement surreptitiously inserted by it to the prejudice of its employer, without the employer's knowledge. Were it not for the defendant's argument to the contrary, it would not be necessary to add that the judge was warranted in finding that the officers of the savings bank were not negligent in failing to find this statement in the Fillebrown mortgage; the Fillebrown mortgage was a mortgage covering ten parcels of land, each particularly described, and which, printed in the record in this case, extends

over five printed pages, and the clause in question, which it was found remained unknown to the officers of the savings bank without their being guilty of negligence was surreptitiously inserted at the end of a statement of the restrictions, which attached to the second of these ten parcels of land. See in this connection *Commonwealth v. Mulrey*, 170 Mass. 103, 106.

4. The defendant's next contention, apparently, is that the court ought to have found that the savings bank retained \$3,000 from the \$8,000 which was secured by the Thomas mortgage, and which the defendant title company originally represented conveyed a clear title, and thereby protected itself against the mortgage of \$905.56 now in question. This claim rests upon the fact that the plaintiff put in evidence a check of \$5,000 as a check by which a payment was made by the savings bank on account of the \$8,000 secured by the Thomas mortgage, and upon the fact which appeared in evidence that at the time the money lent was paid, the house on the lot in question was in process of construction, and \$800 was spent by the savings bank in completing it, and also on the testimony of the treasurer of the savings bank, who, on cross-examination, said that he could not say for a certainty that the balance of the \$8,000 was ever paid. We are of opinion that the presiding judge was warranted in not making a finding that money was retained by the savings bank to protect itself against the mortgage in question, and we see no reason for coming to an opposite conclusion on that question of fact.

5. The defendant's last contention is that there is no evidence on which the court could find that "the defendant gave a certificate that James Thomas held a good title to the premises, free of encumbrances, and that the bank, relying upon the certificate, made a loan of \$8,000 on the premises."

The defendant in its answer admitted "that it examined the title to said lot No. 399," the lot in question, and in the report of the evidence, it is stated that the Thomas mortgage, which contained full covenants of warranty, but did not contain any reference to the mortgage in question, was drawn by the defendant acting for the savings bank; it also appeared, from the check put in evidence, that the money paid on the Thomas mortgage was paid by the defendant title insurance company, and

finally that none of the officers of the savings bank who were examined knew of the existence of it. That was sufficient to justify the finding that was made. So far as this objection rests upon the point of pleading that the bill alleges that a certificate was given, and no formal certificate was put in evidence, the point was not taken in the court below, and cannot now be raised. The fact that interest was paid on the mortgage in question as late as November 6, 1892, is of no consequence. So far as the owner of the equity was concerned, the defendant's mortgage was a subsisting encumbrance, the effect of the estoppel being merely to postpone it to the lien of the Thomas mortgage. The Thomas mortgage was not foreclosed until April 16, 1894; the defendant title insurance company acted for the savings bank in foreclosing that mortgage and thereby cut off its own rights under the mortgage in question as a mortgage which by estoppel was junior to the Thomas mortgage.

The decree entered by the Superior Court should be affirmed.

So ordered.

JAMES M. RAYMOND, executor, *vs.* EVELINA F. WAGNER.

Middlesex. January 24, 1901. — March 7, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

A testatrix lay in bed in one room while two of the subscribing witnesses to a codicil to her will signed in another room on the opposite side of a narrow entry, the doors of both rooms being open. The witnesses sat at a table just inside the open door of their room, and the bed of the testatrix was in such a position that by rising slightly she could have seen the witnesses as they signed, but it did not appear whether or not she had the power thus to raise herself. Immediately after the signing by the witnesses, the codicil was shown to the testatrix. *Held*, that on these facts the witnesses could be found to have subscribed the codicil in the presence of the testatrix.

APPEAL from a decree of the Probate Court for the County of Middlesex disallowing a codicil to the will of Eliza J. Jones, and issuing letters testamentary to James M. Raymond, the appellee, as executor. The codicil simply appointed the appellant, Evelina F. Wagner, executrix in place of the appellee. Petition

for the allowance of the codicil filed in the Probate Court August 7, 1897.

The case was heard by *Holmes*, C. J., who reserved it for the consideration of the full court upon the following report :

"The only question tried before me was whether the codicil was signed by two of the witnesses in the presence of the testatrix. She lay in bed in one room, two of the witnesses signed in another on the other side of an entry, and the codicil immediately thereafter was shown to the testatrix. The doors were open. The distance from door post to door post diagonally along the line of vision was about nine and one half feet. The table at which the witnesses sat was just inside the door of their room, and the distance from the table to the bed of course was a few feet greater. The evidence as to the exact positions of the table and of the bed was conflicting and somewhat uncertain. I was satisfied, however, that the doors were open, and that the bed was in such a position that the testatrix, by rising slightly, her legs remaining in the same place, could have seen into the other room and could have seen the witnesses as they signed. Whether she could have raised herself so as to see is more doubtful. I did not find that she could have done so. I ruled that these facts did not exclude a finding that the codicil was witnessed in the presence of the testatrix, and I found as matter of fact and also ruled as matter of law that the witnesses signed in her presence."

If the ruling was right, the codicil was to be established, otherwise such decree to be entered as might seem proper to the full court.

A. S. Davis, (*W. M. Noble* with him,) for the appellant.

G. A. Brown, for the appellee.

MORTON, J. This is an appeal from the disallowance by the Probate Court of an instrument offered as a codicil to the will of *Eliza J. Jones*. The report of the Chief Justice by whom the case was heard states that the only question that was tried was the question, "whether the codicil was signed by two of the witnesses in the presence of the testatrix." He ruled that the facts as found by him "did not exclude a finding that the codicil was witnessed in the presence of the testatrix," and found as matter of fact and ruled as matter of law that the witnesses

signed in the presence of the testatrix. The question is whether he was bound to find that the witnesses did not subscribe in her presence.

It appears that the testatrix lay in bed in one room and the two witnesses signed in another on the other side of an entry and that immediately thereafter the codicil was shown to the testatrix. The doors between the two rooms were open and the distance from door post to door post diagonally along the line of vision was about nine and one half feet. The table at which the witnesses sat was just within the door of their room, and the bed on which the testatrix lay was a few feet from the door of her room. The bed was in such a position that the testatrix by raising herself slightly from the hips could see into the room where the witnesses were and could see the witnesses as they signed, that is as we understand could see them in the act of writing their names upon the paper. It was doubtful whether the testatrix could have raised herself. It is stated that it was not found that she could.

The case closely resembles *Riggs v. Riggs*, 135 Mass. 238. The witnesses and the testatrix in this case were a few feet farther apart than the witnesses and the testator were in that case. The rooms in that case adjoined, while in this they were separated by an entry. But the witnesses were in the line of vision of the testatrix in this case, and by slightly raising herself she could have seen them as they signed, as the testator could have done in that case by slightly turning his head if he had been able to. It is not expressly found as it was in that case, that the testatrix was conscious and "could hear all that was said and knew and understood all that was done." But from the manner in which the case is reported, it is to be assumed, we think, that all facts other than those stated in the report were found in favor of the validity of the codicil, and therefore that the testatrix was conscious and knew and heard and understood what was done. The intervening entry was not, in view of her position and that of the witnesses, an obstacle to her sight. And when once the step has been taken that subscribing witnesses, though in another room, may still be in the presence of the testator, we do not see how it can be held that the fact that they subscribed in another room separated by an entry from

that in which the testator was, is, of itself, conclusive that they did not subscribe in his presence. Whether in such a case they are to be regarded as subscribing in his presence depends we think on whether the testator knew and understood and was conscious of what they were doing and but for some physical infirmity which did not otherwise affect him could have seen or heard what took place. Otherwise it would follow that there could be no such thing as an attestation of a will by subscribing witnesses in the presence of a person who was blind. If the position of the subscribing witnesses and of the testator and their proximity to him are such that but for some physical infirmity which did not otherwise affect him he could see or hear what they were doing, and if he was conscious of and knew and understood what took place, then we think that the subscribing witnesses are to be regarded as subscribing in his presence. It is not the matter of juxtaposition merely but the result as a whole that is to be looked at. And it seems to us that on the facts as found the two subscribing witnesses must be regarded as having subscribed in the presence of the testatrix. See *Riggs v. Riggs*, *ubi supra*, and *Cunningham v. Cunningham*, 80 Minn. 180. *Cook v. Winchester*, 81 Mich. 581. *Hopkins v. Wheeler*, 21 R. I. 533.

It is to be observed that, beyond the fact that the rooms were separated by an entry, nothing appears as to the relation of the rooms to each other. It is possible that they were more closely connected in actual use than that fact would seem to imply. Certainly the mere fact that the subscribing witnesses were twelve or fifteen feet from the testatrix would not of itself prevent them from being in her presence. A case might be conceived where the subscribing witnesses might be in the line of vision of the testator but at such a distance that it would be plain that they could not be regarded as being in his presence. But that is not the case here.

Codicil established ; decree accordingly.

SELECTMEN OF HADLEY, petitioners.

Hampshire. March 5, 1901. — March 11, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

The decision of commissioners, appointed under St. 1890, c. 428, to prescribe the alterations and apportion the work upon the abolition of a grade crossing, is final as to matters of fact, and a judge of the Superior Court has no power to order a review of a former decree of that court confirming a decision of such commissioners, on the ground that a widening of the space between the abutments on the two sides of the road under the railroad bridge would add to the public safety and convenience to an extent sufficient to justify the additional expense.

PETITION of the selectmen of Hadley to the Superior Court for the county of Hampshire for leave to file a bill of review for the purpose of obtaining a review and reversal of a decree of that court of June 25, 1900, confirming a decision of commissioners appointed under St. 1890, c. 428, prescribing the alterations for the abolition of a grade crossing of the Massachusetts Central Railroad and Amherst Road in Hadley, known as Flaherty's Crossing, filed August 28, 1900.

The Central Massachusetts Railroad Company and the Boston and Maine Railroad, respondents, demurred to the petition.

The case was heard in the Superior Court, by *Aiken, J.*, who ordered that the former decree of that court be reversed and the matter recommitted to the same commissioners, and reported the case for the consideration of this court. If the demurrer should have been sustained, or if the order and decree were not justified, then the decree of the Superior Court theretofore made was to remain in force and effect.

The report concluded as follows, the last paragraph (which is printed on the following page) giving the reasons for the decree :

"I find that at the hearing before the commissioners appointed by the Superior Court, one or more of the selectmen of Hadley, who were present, understood from statements made at the hearing, that the State highway commission did not object to the plan then presented and subsequently adopted ; but I find that, while such statements were not true and the selectmen were mistaken in their understanding, they were not

induced thereby to assent to the report of the commission or to the decree subsequently made ; and I find they would have continued to acquiesce in said decree, and would not have instituted the present proceedings but for the letter of Mr. McClintock [chairman of the State highway commission].

“ I find there was no fraudulent intent in the making of said statements, and the statements either as alleged or proved are not sufficient to justify the reopening of proceedings, or a revision of the decree.

“ Considerations of public convenience and safety, however, determine my conclusions in this matter. The evidence relating to such considerations was admitted subject to the exceptions of the respondents. I find that by reason of the continuous proximity of the highway and railroad as they approach the crossing ; and by reason of sharp curves in the location of the proposed highway as it passes under the bridge provided for the railroad ; and by reason of the space between the abutments of said bridge being insufficient for the usual and prospective travel of the public by street railway and otherwise ; and by reason that the abutments are so located that the traveller on the highway has a very limited view of the road ahead of him, where a view is essential by reason of the various forms of public travel liable to be concurrent at the place in question ; and because in my judgment a widening of the space between the abutments will add to the public safety and convenience to an extent to justify the additional expense, (which is from \$2,500 to \$5,500 according to the plan adopted,) that the decree before made should be reversed, and the matter recommitted to the same commissioners and I so ordered and decreed.”

J. C. Hammond, for the petitioners.

R. W. Irwin, for the Boston and Maine Railroad and the Central Massachusetts Railroad Company.

HOLMES, C. J. The original proceeding in this case was under St. 1890, c. 428, for the abolition of a grade crossing. On June 25, 1900, a decree was made confirming the decision of the commissioners, and the parties were ordered to proceed to carry out the work of abolishing the grade crossing as provided in the commissioners' report. The attorneys of the town of Hadley had indorsed their agreement that the decree might be

entered, and the Commonwealth had waived hearing upon it. Thereupon the work was begun, and a considerable sum has been expended by the Boston and Maine Railroad. The selectmen of Hadley now have petitioned for leave to file a bill of review, seemingly being induced to do so by the fact that the Massachusetts Highway Commission is not satisfied with the report and may decline to build a State highway at the point in question unless a change is made in the plan. The petition was heard by a judge of the Superior Court, and he found that a widening of the space between the abutments on the two sides of the road under the railroad bridge would add to the public safety and convenience to an extent sufficient to justify the additional expense, and on that ground granted leave to file the bill, and, it being understood that the whole case should be gone into at once, reversed the decree and recommitted the matter to the commissioners subject to a report by him to this court. The judge distinctly rejected other grounds for review, and, as he reports, puts his decree on the single ground just stated.

We assume without deciding that the former decree was a final decree and that the statutes leave it open to revision by a bill of review in a proper case. But we think it so plain that this is not a proper case for such revision that we shall not argue the matter at length, especially as the case ought to be decided at once. This decree was made with the petitioners' consent, *Evans v. Hamlin*, 164 Mass. 239, 240, and the ground on which it now is reversed is that the judge takes a different view of the facts from that which was taken by the commissioners. The reversal is not put on the ground that the commissioners were deceived or misled in any way, or that new evidence has been discovered other than cumulative evidence on issues understood and considered by the commissioners. We do not see that it is necessary to say more. The relation of the commissioners to the court is well set forth in *Old Colony Railroad, petitioner*, 163 Mass. 356, 359. We quote the restrictive words which are applicable to this case: They "constitute a tribunal which is finally to decide the matters of fact. . . . The court has no power to revise their report and order a change to be made otherwise than as they finally recommend." Without more than appears in this report the judge could not properly

have refused to confirm the commissioners' decision in the first instance; and even if he, instead of the commissioners, had been the proper tribunal to try the facts, we see no ground, according to the ordinary principles on which bills of review are allowed to be filed, on which he now could reopen his decree. Another remedy is given by statute in case an alteration shall be deemed necessary hereafter. Pub. Sts. c. 112, § 129. *Northampton v. New Haven & Northampton Co.* 175 Mass. 430.

Decree of June 25, 1900, to stand.

PEOPLE'S SAVINGS BANK OF WOONSOCKET vs. WILLIAM
B. JAMES.

Middlesex. November 26, 1900. — March 12, 1901.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

A false representation made with fraudulent intent by A. to B., a woman, that A., the speaker, was a man of large means and credit and had superior facilities for raising money, and that he could raise it on easier terms than B. could, and that if he had her land he could at once get a certain sum of money upon a mortgage of it, whereby B. was induced to convey to A. her land, which in consequence was sold on an execution against A., is not such a fraud as to afford a ground for equitable relief, in a bill brought by B. against the purchaser of the land at the execution sale.

HOLMES, C. J. This is a bill to redeem from a tax sale. There is an answer and also a cross-bill by the defendant, and a demurrer to the cross-bill by the plaintiff. The demurrer was sustained, the cross-bill was dismissed, and a decree was entered for the plaintiff upon its bill. The defendant appeals. The question before us concerns only the dismissal of the cross-bill. The case intended to be made by the cross-bill is this. The plaintiff derives its title from one Melina G. Kelley through one Rice, and holds it subject to the equities, if any, of Kelley against Rice. The defendant (the plaintiff in the cross-bill) derives his title through a subsequent conveyance from Kelley, and has succeeded to her equities. We express no opinion whether in fact he has succeeded to them. *Foster v. Wightman*,

123 Mass. 100. *Fairfield v. McArthur*, 15 Gray, 526. Her equities arise out of the following facts. She was under contract to Rice and wished to pay off this and other liabilities, and to that end was intending to sell or mortgage her land, as she told Rice. Following but slightly abridging the language of the bill, Rice, wishing to get the land without giving an equivalent, fraudulently represented to her that he was a man of large means and credit, that he had superior facilities for raising money, and could raise it on easier terms than she could, and that if he had the title to her land he could at once get \$12,000 upon a mortgage of it from a bank in Providence, Rhode Island, and he promised that if she would convey the land to him he would raise that amount, pay Kelley's liabilities, give the balance to her, and return to her the land subject to the mortgage. She believed him and conveyed to him the land. It is alleged that Rice knew that his representations as to existing and contingent facts were false, he being at that time insolvent, and that no effort was made by him to obtain any money on his own credit. It is also alleged that his promises were made without any reasonable expectation on his part that he would be able to perform them. He did not perform them, and afterwards went into insolvency and was discharged. The land in question was attached and was sold on execution to the plaintiff. It should be added that the land conveyed to Rice is alleged to have been worth about \$17,000, but that a part of it not embraced in this bill was subject to a mortgage of \$7,800, so that the security available for the proposed mortgage was less than \$10,000 on the defendant's own valuation, which presumably is put as high as it will bear.

We assume that upon a general demurrer we are to consider the case evidently intended to be made, without too close a criticism of the words used. But the demurrer in this case called attention to the insufficiency of the allegations of fraud, and in view of the fact that no amendment was made it is fair to suppose that the pleader has stated the case as strongly as he could. We are of opinion that although the case comes very near the line the cross-bill does not make out a title to relief.

The cross-bill does not allege that Rice intended not to give

the stipulated consideration for the land, or not to return it when required to do so by the terms of his bargain. The words "desiring to obtain possession of said real estate without rendering any equivalent therefor" just fall short of alleging an intent not to make an attempt to carry out the terms of the understanding. They are a discrediting summary of a general state of mind, but do not allege the necessary specific intent. We may add here that it is not alleged that the sale on execution under which the plaintiff claims was in any way the intended result of Rice's acts.

The only representations alleged to have been made are that Rice, the speaker, was a man of large means and credit and had superior facilities for raising money, that he could raise it on easier terms than Kelley could, and that if he had her land he could at once get \$12,000 upon a mortgage of it. These we must assume were made with knowledge of their falsity, and with fraudulent intent. But none of them in our opinion reaches the point at which equity interferes. Rice's interest was manifestly adverse to Kelley's, and the parties were at arm's length. They stood like the parties to a sale, or at least were not in confidential relations. The statement concerning the mortgage by its very terms and nature depended on the value of the security, a point on which Kelley presumably was at least as well qualified to judge as Rice, and according to the defendant's valuation it was absurd on its face. Necessarily too it was a mere prophecy as to the future, not a statement of any material present fact. The representations concerning Rice's solvency and credit raise a nicer question, but they do not change the result.

It may be that fraudulent representations as to the solvency of a third person in terms as general as those alleged would give a right of action. See *Bowen v. Carter*, 124 Mass. 426; *Andrews v. Jackson*, 168 Mass. 266. It may be that such representations as to one's own solvency knowing that he was insolvent at the moment would warrant the granting of relief. *Cincinnati Coöperage Co. v. Gaul*, 170 Penn. St. 545. See *Morris v. Talcott*, 96 N. Y. 100. It may be that they would have equal effect if they purported to sum up specific data before the speaker. *Morse v. Shaw*, 124 Mass. 59. So no doubt if the

statement itself was somewhat more specific. *Judd v. Weber*, 55 Conn. 267. See *Way v. Ryther*, 165 Mass. 226, 229. Possibly cases very near the line might be left to the jury, even where the import of the words used was undisputed. See *Morse v. Shaw*, 124 Mass. 59. For beside the distinction which has been taken between words purporting to be expressions of opinion and those which purport to be statements of fact, there is a distinction in the nature of the representations after their import is settled, and a jury might be called in as elsewhere in cases near the line.

But the representations alleged, when standing by themselves, unqualified by any further circumstance, are of such elastic meaning and so obviously may be wholly dependent upon an optimistic view of his own case, that, when they are made by one party to a bargain, the other party relies upon them at his peril. Or if another form of words be preferred, it may be said that such a statement without more is to be taken to import only an expression of opinion, and that for that reason the other party follows it at his own risk. *Lyons v. Briggs*, 14 R. I. 222. *Jude v. Woodburn*, 27 Vt. 415. *Deming v. Darling*, 148 Mass. 504, 505. It will be observed that it is not alleged that Rice knew that he was insolvent, and that all the allegations of fraud would be satisfied by showing that Rice made the supposed statements, and that at the time he knew that he was a man of small means, without important standing as a man of wealth.

There is no element of a fraudulent promise, that is, of an implied and fraudulent representation of intention, in the case, because, as we have said, there is no allegation that Rice made his promises with intent not to perform them. The effect of those promises, if anything, as contracts does not come into question here. We must take the cross-bill as intended for a cross-bill properly so called, and not as an anomalous proceeding under St. 1887, c. 883, § 3. The prayer for an account of what is due Rice and others, to be sure, looks in the direction of an affirmance of the transaction, treating the conveyance of the land to him as a valid security, although only a security. But the final prayer that the plaintiff be debarred from having or claiming any title or right in the premises adverse to the defendant sounds in rescission, and asks the relief that naturally

would be sought in a cross-bill intended to establish that the plaintiff in the original bill had no right to redeem. We assume that to have been the object of the cross-bill, and are of opinion that the demurrer to it properly was sustained.

Decree affirmed.

G. V. Phipps & J. A. Curtin, for the defendant.

S. H. Dudley & H. Dudley, for the plaintiff.

ANNIE C. McNEIL, administratrix, *vs.* CITY OF BOSTON.

Suffolk. March 7, 1901. — March 12, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Whether land belonging to a city or town seemingly prepared for a footway and used by the public as such, ever can become a highway or town way by dedication, notwithstanding Pub. Sts. c. 49, § 94, *quære*.

Permitting the use by the public of an ordinary entry or flight of stairs in a building belonging to a city or town is not a dedication, even if a public footway could be so created.

A flight of stairs in a building belonging to a city or town, leading from the outside of the building only to a room in it, is not a highway or town way within the meaning of Pub. Sts. c. 52, §§ 17, 18, giving remedies for death, injury or damage caused by defects therein, nor is it a way "entering on and uniting with an existing public highway" within Pub. Sts. c. 49, § 95, in regard to causing the entrances of such ways to be closed when the public safety demands it or cautioning the public against entering them when dangerous.

A city is not liable for injuries caused by a defect in a flight of steps leading to a basement room of a schoolhouse, used as a polling place, to a citizen who was going down the steps for the purpose of entering the room to vote.

TORT to recover for injuries and conscious suffering of the plaintiff's intestate followed by death, caused by an alleged defect in a short flight of steps leading to a basement room of a schoolhouse at the corner of St. Botolph Street and Cumberland Street in Boston, used as a polling place, when the plaintiff's intestate was on his way to vote, said steps being alleged to be a part of a public footway or highway of the city of Boston. Writ dated November 29, 1898.

The case was heard in the Superior Court upon the following agreed facts:

On December 21, 1897, the plaintiff's husband and intestate, Norman McNeil, received injuries while walking down a short flight of steps leading into a room, at the farther end of which, polls and voting booths had been erected by the city of Boston for the purpose of holding an election on that day.

On December 28, 1897, said Norman McNeil, after conscious suffering, died in consequence of said injuries, and the plaintiff was duly appointed his administratrix.

The plaintiff gave to the defendant due notice of the time, place and cause of said injuries, and brought this action within the time allowed by law to recover damages therefor.

On said December 21, 1897, and for seven or eight years previously, the defendant owned, occupied and controlled the parcel of land situated on the corner of St. Botolph Street and Cumberland Street within its corporate limits. Upon a part of said parcel of land the defendant in 1889 had erected a public schoolhouse. The room in which the election was taking place on the day of the accident had been used for seven or eight years as a polling place at elections, by the order and consent of the defendant, and no part of the room had been used for school purposes. This room had also been used on different occasions as a ward room for political meetings and the like for seven or eight years before the day of the accident.

St. Botolph Street was at the time of this accident a public highway, duly laid out and established by the city of Boston, and had been a public highway for more than seven or eight years. This street was about thirty-four feet from curb to curb, and on the side next to said parcel of land was a brick sidewalk about nine feet wide and extending the full length of the parcel. Leading from the inner side of said brick sidewalk was an entrance through an iron gate into an open space known as the school yard, and used as a play yard by the children who attended this school. About fifty feet from said brick sidewalk was a door in the schoolhouse building which opened from outdoors upon a short flight of six or seven steps inside the schoolhouse, which led down into the room above mentioned. This room was thirty-seven feet ten inches in length and about thirty feet in width, and about one third of it upon the day of the accident was railed off and was occupied by the voting booths,

the officers of election and the election apparatus. The other two thirds of the room, being the part of the room nearest the door and flight of steps above mentioned, was left free for the public and for the voters.

On the day of the accident, the plaintiff's intestate, who was a duly qualified voter in that precinct and entitled to vote at the election which was then taking place, drove in a carriage from his house to the entrance of the school yard. He alighted upon the brick sidewalk and walked across it through the iron gate down to the door, and was in the act of walking down the short flight of steps on his way to the polls, when, by reason of some defect in the steps, he slipped and fell and received the injuries mentioned above, which were caused solely by the defect in the steps.

The way or route which the plaintiff's intestate walked and travelled upon the day of his accident, from the sidewalk to the room in which the election was taking place, was the usual and proper and only way or route then in use, and this way or route had been used upon many previous occasions by the public and by the voters, with the knowledge and consent of the defendant, and by its order and direction for seven or eight years before. It was used merely as a footway for foot travellers, and was not used and could not be used for carriages and horses and teams. The steps above mentioned were in the travelled part of the footway leading to the polls.

The accident to the plaintiff's intestate happened about half past eleven o'clock in the forenoon. The polls had been open continuously from six o'clock in the morning, and several hours before the accident to the plaintiff's intestate two or three other persons had slipped upon the same steps upon which the plaintiff's intestate afterwards slipped and fell and received his injuries.

The defendant had not directed or caused the entrance of this way to be closed up, and had not caused any notice to be given that such way was dangerous and had not taken any means to caution the public against entering upon such way, but, on the contrary, had permitted and allowed and invited the public to use this way as above stated.

On the day of the injuries to the plaintiff's intestate, an

election was being held for mayor and other officers of the city of Boston, and this footway was used both in going to the polls and in returning from the polls by men and women who were entitled to vote at that place and at that time, and by other members of the public. The polls had been duly erected in said part of said room by order of the defendant.

The plaintiff's intestate was at the time of his injury in the exercise of due care and diligence, and the defendant was negligent in the premises.

If, upon the above facts and upon all inferences of fact which might be drawn therefrom, a jury would be warranted in finding that the place of the accident was a way, within the meaning of the statutes imposing a liability upon cities for defects in ways, the defendant was to be defaulted, and the plaintiff's damages were to be assessed by a jury in the Superior Court. If, on the other hand, a jury would not be warranted in finding that the place of the accident was a way, within the meaning of such statutes, judgment was to be entered for the defendant.

On the foregoing facts the Superior Court gave judgment for the defendant; and the plaintiff appealed.

C. Reno, for the plaintiff.

S. M. Child, for the defendant.

HOLMES, C. J. If for any reason land belonging to a city or town, seemingly prepared for a footway and used by the public as such, can become a highway or a town way simply by dedication, notwithstanding Pub. Sts. c. 49, § 94, which we are far from intimating, the elements of a dedication are wanting in the case of an ordinary entry or flight of stairs in a public building. In such a case it is evident to every one from the visible facts alone that the use of the entry or stairs, like the use of the rooms to which they lead, is merely permissive during such time as the public authorities continue to devote the building or rooms to the same purposes as at present, and that it may be stopped at any moment. Furthermore, a flight of stairs in a building leading only to a room in it is not a highway or a town way within the meaning of Pub. Sts. c. 52, §§ 17, 18, or a way "entering on and uniting with an existing public highway" within c. 49, § 95. *Sullivan v. Boston*, 126 Mass. 540. The argument to the contrary is merely an attempt by a perversion

of language from its plain and common meaning to make out a liability of cities and towns which heretofore has been decided not to exist. *Hill v. Boston*, 122 Mass. 344.

Judgment for defendant affirmed.

ATTORNEY GENERAL vs. HENRY BIGELOW WILLIAMS
& another, trustees, & others.

Suffolk. January 23, 24, 1901. — March 13, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

St. 1898, c. 452, relating to the height of buildings on and near Copley Square in Boston, provides that all damages suffered by reason of the provisions of the act should be paid by the city of Boston. *Held*, that the city of Boston was not a necessary nor a proper party to an information by the Attorney General to compel the removal of the portion of a certain building exceeding the limit imposed by the act, not being entitled to be heard on the question of whether the defendant was violating the law. The fact that the defendant must resort to the city for his damages, and in a suit to recover them may raise some of the questions heard and determined in this suit, is not a sufficient reason for making the city a party to litigation in which its interests are only collateral.

St. 1898, c. 452, relating to the height of buildings on and near Copley Square in Boston, was held in 174 Mass. 476, to be a taking of rights in property for the benefit of the public who use Copley Square, the Legislature seeking thereby to promote the beauty and attractiveness of a public park in the capital of the Commonwealth. This was upon an averment in the bill, that Copley Square "is an open square and a public park intended for the use, benefit and health of the public, and is surrounded by buildings devoted to religious, charitable and educational purposes, some of which contain books, manuscripts and works of art of great value." Now, *held*, that the facts agreed in the case fully sustain this averment.

St. 1898, c. 452, relating to the height of buildings on and near Copley Square in Boston, is not in violation of the Constitution of the United States as impairing the obligation of contracts, §§ 8 and 4 providing adequate compensation for all persons suffering damage under its provisions.

If a statute can be given a reasonable construction which will sustain it as constitutional, it is the duty of the court so to construe it, although its passage by the Legislature may have been requested or advocated on a ground which would not be a constitutional justification for its enactment.

INFORMATION by the Attorney General against Henry Bigelow Williams and another, trustees of the Westminster Chambers Trust, the Westminster Construction Company, and Isaac F.

Woodbury and George E. Leighton, copartners doing business under the name of Woodbury and Leighton, to restrain the defendants from maintaining the building called the Westminster Chambers on Copley Square in Boston above the height of ninety feet, and to order the removal of the portion of the building constructed above that height in violation of the provisions of St. 1898, c. 452, filed September 17, 1898, wrongly printed September 11, 1898, in 174 Mass. 476.

By the decision in this case made October 30, 1899, reported in 174 Mass. 476, it was held that St. 1898, c. 452, relating to the height of buildings on and near Copley Square in Boston, was a taking of rights in property for the benefit of the public who use Copley Square, the Legislature seeking thereby to promote the beauty and attractiveness of a public park in the capital of the Commonwealth, giving compensation to any person sustaining damage by reason of the limitation of the height of buildings provided for in the act, and that this was a public purpose for which the right of eminent domain lawfully could be exercised; also, that the approval by the park commissioners of the city of Boston of the band of "sculptured ornaments" of terra cotta, constituting the architrave, frieze and cornice of two sides of the building, did not affect the limitation of height named in the statute.

On October 2, 1900, the defendants filed the following motion:

"The defendants now represent that they desire to ascertain what alterations of their building described in the information are necessary to make it conform to the opinion of the court heretofore rendered on the demurrer and pleas in this cause, without prejudice to their right to further defend upon the merits, or any other rights; that as the statute of 1898, on which the information is based, purports to make the city of Boston liable to the defendants for any damages occasioned them by the operation of the statute, the character and extent of such alterations cannot be conclusively determined in this proceeding unless and until the city of Boston is made a party thereto; and that if such alterations are ascertained and made by the defendants without joinder of the city of Boston as a party thereto, the defendants will incur the risk of loss, and of having thereafter to

make different or further alterations in their building, which risks they ought not to be required to incur. Wherefore, for this reason, and for other grounds and reasons appearing in their answer, the defendants move that the informant be required to join the city of Boston as a party defendant to this information, as a condition of further prosecuting the same, and that in default of such joinder the further prosecution thereof be stayed until the right of the defendants to compensation for all damages occasioned to their property by the operation of said statute, and the liability of the city of Boston therefor, are conclusively determined."

On October 5, 1900, this motion was denied by *Barker, J.*, and the defendants appealed from such denial.

Subsequently the case came before *Morton, J.*, on a motion of the Attorney General for a final decree, and thereupon, at the request of all parties, the case was reserved by the justice upon the pleadings, the defendants' motion to have the city of Boston made a party, and the appeal from the denial thereof, and the agreed facts, for the consideration of the full court, such disposition thereof to be made as to the court should seem meet.

The agreed facts were upon the following subjects: The history of the building before the passage of the statute, the history of Copley Square, the history of the statute, proceedings subsequent to the statute, and a description of the buildings on and about Copley Square. The agreed facts are so disposed of by the decision of the court that a statement of them is unnecessary.

St. 1898, c. 452, entitled "An Act relative to the height of buildings on and near Copley Square in the city of Boston," is as follows:

"Section 1. Any building now being built or hereafter to be built, rebuilt or altered in the city of Boston, upon any land abutting on St. James avenue, between Clarendon street and Dartmouth street, or upon land at the corner of Dartmouth street and Huntington avenue, now occupied by the Pierce building, so-called, or upon land abutting on Dartmouth street, now occupied by the Boston Public Library building, or upon land at the corner of Dartmouth street and Boylston street, now occupied by the New Old South Church building, may be

completed, built, rebuilt or altered to the height of ninety feet, and no more ; and upon any land or lands abutting on Boylston street, between Dartmouth street and Clarendon street, may be completed, built, rebuilt or altered to the height of one hundred feet, and no more: *provided, however*, that there may be erected on any such building, above the limits hereinbefore prescribed, such steeples, towers, domes, sculptured ornaments and chimneys as the board of park commissioners of said city may approve.

“Section 2. The provisions of chapter three hundred and thirteen of the acts of the year eighteen hundred and ninety-six, and of chapter three hundred and seventy-nine of the acts of the year eighteen hundred and ninety-seven, so far as they limit the height of buildings, shall not be construed to apply to the territory specified and restricted in section one of this act.

“Section 3. The owner of or any person having an interest in any building upon any land described in section one of this act, the construction whereof was begun but not completed before the fourteenth day of January in the current year, who suffers damage under the provisions of this act by reason or in consequence of having planned and begun such construction, or made contracts therefor, for a height exceeding that limited by section one of this act for the locality where said construction has been begun, may recover damages from the city of Boston for material bought or actually contracted for, and the use of which is prevented by the provisions of this act, for the excess of cost of material bought or actually contracted for over that which would be necessary for such building if not exceeding in height the limit prescribed for that locality by section one of this act, less the value of such materials as are not required on account of the limitations resulting from the provisions of this act, and the actual cost or expense of any re-arrangement of the design or construction of such building made necessary by this act, by proceedings begun within two years of the passage of this act, and in the manner prescribed by law for obtaining payment for damages sustained by any person whose land is taken in the laying out of a highway in said city.

“Section 4. Any person sustaining damage or loss in his

property by reason of the limit of the height of buildings provided for in this act, may recover such damage or loss from the city of Boston, by proceedings begun within three years of the passage of this act, and in the manner prescribed by law for obtaining payment for damages sustained by any person whose land is taken in the laying out of a highway in said city.

“Section 5. This act shall take effect upon its passage.”

Approved May 23, 1898.

A. F. Pillsbury, for the defendants.

S. J. Elder & E. A. Whitman, for the plaintiff.

KNOWLTON, J. This case was considered by the full court on the bill, demurrer, plea, and certain facts found at the hearing before a single justice, and was reported in 174 Mass. 476. It now comes before us for a final decree on the pleadings and certain facts agreed by the parties, subject to objection as to their competency. We need only consider how far, if at all, the aspect of the case is changed by the competent facts agreed.

The defendants contend that a decree cannot be entered in this suit without first joining the city of Boston, which is made liable by the statute for such damages as the defendants suffer from the taking of an interest in their land, and they have moved to have the city made a party. This motion was rightly overruled. The city of Boston is not a proper party to this suit. Its rights and liabilities in reference to the taking are fixed by the statute, and it is not entitled to be heard on the question whether the defendants are violating the law; nor does the fact that the defendants must resort to the city for the recovery of their damages, and that the city may then raise some of the questions which have been heard and determined in this suit, constitute a sufficient reason for bringing the city into litigation on subjects to which its interests are only collateral.

The former decision was upon an averment of the bill that Copley Square, upon which said St. James Avenue abuts, “is an open square and a public park intended for the use, benefit and health of the public, and is surrounded by buildings devoted to religious, charitable and educational purposes, some of which contain books, manuscripts and works of art of great value.” It is contended that the facts agreed fail to sustain this averment.

Without considering these facts in detail, we are of opinion that they fully sustain the averment.

The agreed facts as to the construction of the building leave the case as it was formerly presented, without material modification. The erection of the building to its present height was expressly forbidden by the statute.

The statute is not unconstitutional as impairing the obligation of contracts. In addition to the express provisions contained in section three, covering certain kinds of damage, there is a general provision in section four which gives compensation to any person sustaining damage by reason of the limit of the height of the buildings provided for in the act.

Most of the matters stated in regard to the proceedings preliminary to the passage of the act, are incompetent. The act must be construed by an application of its language to the subject to which it relates. If it can be given a reasonable construction which will sustain it as constitutional, it would be our duty so to construe it, even if it appeared that in the endeavors which suggested the legislation, considerations were presented to the Legislature which would not be a sufficient constitutional justification for such an enactment.

The facts disclosed in regard to the circumstances preceding the commencement of this suit do not sustain the defence of laches.

Decree for the plaintiff.

ORDER FOR DECREE.

In the case of *Hosea M. Knowlton, Attorney General, v. Henry Bigelow Williams et al.*, pending in the Supreme Judicial Court for the county of Suffolk:

ORDERED, that the clerk of said court in said county make the following entry under said case in the docket of said court, and file a decree as follows, viz.:

This case came on to be heard and was argued by counsel and thereupon on consideration thereof it is ordered adjudged and decreed as follows: the defendants Williams & Ayer, trustees of the Westminster Chambers Trust, so called, and each of them, and their servants and agents are enjoined and restrained from maintaining the building mentioned in the

information, and known as Westminster Chambers, after the first day of October next, above the height of ninety feet, and from hereafter constructing or erecting it above that height, and from maintaining it above that height if newly constructed; without prejudice however to their right under the statute to maintain or erect and maintain on said building above the height of ninety feet such steeples, towers, domes, sculptured ornaments, and chimneys as the board of park commissioners of the City of Boston may hereafter approve; and the said Williams & Ayer trustees are commanded and directed on or before the first day of October next to take down and remove those parts of the walls of said building which are above the height of ninety feet, and such other parts of said building as are above that height; this is without prejudice however to their right under the statute to erect and maintain such steeples, towers, domes, sculptured ornaments, and chimneys as the Board of Park Commissioners of the City of Boston may hereafter approve; and the plaintiff shall recover his costs of these defendants. The other defendants will take no costs.

THEODORE TEMPLE vs. FLORENCE A. MORSE.

Middlesex. March 15, 1901. — March 16, 1901.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

A deed granting a right to flow adjoining land of the grantor without words of inheritance gives only an estate for life, which is not enlarged by covenants of warranty in the deed to the grantee and his heirs. And a subsequent deed of the adjoining land to another with a covenant against encumbrances excepting the flowage rights of the first grantee, then living, does not except more than was granted.

TORT to recover damages for an alleged illegal flowing of the plaintiff's land by the defendant. Writ dated December 21, 1896.

At the trial in the Superior Court, before *Sherman, J.*, it appeared that the plaintiff and the defendant owned adjoining farms situated in the easterly part of Marlborough, and that in the year 1849 all the land included in both of said farms

belonged to one Levi F. Whitmore, from whom both the plaintiff and defendant claimed title.

The defendant contended that she had succeeded to certain rights of flowage granted by Whitmore to one Stephen R. Phelps, from whom the defendant claimed title. The deed of Whitmore to Phelps was dated November 7, 1849. It conveyed "unto the said S. R. Phelps a certain tract or parcel of land situated on the great road leading to Boston and in the easterly part of said Marlborough containing eleven acres be the same more or less [Description] and as passing in the sale the right to flow the lands of the grantor from the seventh day of October to the first day of the next May annually provided however . . ." [Here followed the definition and limitations of the rights of flowage.]

The habendum clause and covenants were as follows: "To have and to hold the above granted premises with the privileges and appurtenances thereto belonging to the said Stephen R. Phelps to his use and behoof forever. And I, the said Levi F. Whitmore for myself and my heirs executors and administrators do covenant with the said S. R. Phelps his heirs and assigns that I am lawfully seised in fee of the aforegranted premises that they are free from all incumbrances except any right which any person or persons may legally have to a bridle way leading through said premises by virtue of occupancy that I have good right to sell and convey the same to the said Phelps as aforesaid and that I will and my heirs executors and administrators shall warrant and defend the same to the said Phelps his heirs and assigns forever against the lawful claims and demands of all persons."

The plaintiff claimed title through one Marshall Dadmun, who acquired his land from Whitmore by deed of May 1, 1869. The deed contained the following covenant and exception: "And I, the said grantor for myself and my heirs, executors and administrators do covenant with the said grantee and his heirs and assigns that I am lawfully seized in fee simple of the aforegranted premises, that they are free from all incumbrances except the right to flow a small portion of said premises at certain seasons of the year for a particular description of the same, reference can be had to a deed from the grantor to Stephen R.

Phelps dated Nov. 7, 1849 recorded with Middlesex Deeds Book 578 Page 55."

There was evidence tending to show that from one to three acres of the plaintiff's farm were flowed by the defendant's dam during more or less of the time covered by the declaration, but there was no evidence tending to show a flowing in excess of the rights granted in the deed from Whitmore to Phelps if such rights still existed. It appeared that Phelps died in the year 1871.

The defendant asked for instructions based on the defendant's alleged rights of flowage derived from Phelps, and asked the judge to rule that on the evidence the plaintiff was not entitled to recover and that the jury should return a verdict for the defendant. The judge refused to give the instructions requested, and charged the jury in substance, that under the conveyances introduced in evidence the right of Phelps to flow the land now owned by the plaintiff terminated with the death of Phelps, and that the defendant, since Phelps' death, had no right to flow any portion of the plaintiff's land. To this instruction the defendant excepted.

The jury returned a verdict for the plaintiff for the sum of one dollar; and the defendant alleged exceptions.

J. T. Joslin, for the defendant.

J. W. McDonald, for the plaintiff, was not called upon.

PER CURIAM. The estate conveyed to Phelps was a life estate. The warranty of the premises to Phelps and his heirs did not enlarge the grant. *Blanchard v. Brooks*, 12 Pick. 47, 67. *Clanrickard v. Sidney*, Hob. 273. The exception in the covenants against encumbrances in the later deed of Whitmore to Dadmun under which the plaintiff claims was not more extensive than the liability created by the deed to Phelps. At the date of the later deed Phelps was alive.

Exceptions overruled.

H. BURE CRANDALL vs. WILLIAM H. COLLEY.

Suffolk. March 14, 1901. — March 18, 1901.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

In the Municipal Court of the city of Boston a plaintiff declared on an account annexed with seven items amounting in all to \$40, with a credit of \$5, leaving the balance sued for \$35. He obtained judgment for \$12, and costs amounting to \$3.66. Thereupon, the plaintiff appealed to the Superior Court, which gave him judgment for \$16. The defendant claimed costs after the appeal, under Pub. Sts. c. 198, § 4, on the ground that the Superior Court included in its judgment for \$16 interest from the date of appeal to the date of its judgment, and that, allowing for the interest so included, the plaintiff did not recover a greater sum for debt or damages than he recovered by the first judgment. *Held*, that there was nothing to show that the increase in the amount recovered was for interest, that it did not even appear that the finding of the Superior Court was upon the same items of the account as that of the Municipal Court, and that the plaintiff was entitled to full costs.

CONTRACT upon an account annexed with seven items amounting in all to \$40 with a credit of \$5, leaving the balance sued for \$35. Writ dated March 17, 1900.

The action was brought in the Municipal Court of the city of Boston, where judgment was rendered for the plaintiff on April 6, 1900, for \$12 with costs from March 7, 1895, namely, \$3.66. The plaintiff appealed from this judgment in his favor to the Superior Court, which court found for him on December 6, 1900, in the sum of \$16.

In the Superior Court after this judgment the defendant contended that the plaintiff should recover no costs arising after the appeal, but should pay the costs of the defendant arising after appeal, as provided by Pub. Sts. c. 198, § 4, on the ground that the finding of the Superior Court included interest accruing from the date of appeal to the date of its finding, and that making due allowance for the interest so included, the sum recovered for debt or damages was not greater than that recovered in the lower court.

The Superior Court allowed full costs to the plaintiff; and the defendant appealed.

F. K. Linscott, for the defendant.

W. J. Williams, for the plaintiff.

HOLMES, C. J. We have no way of knowing that the excess of the sum recovered in the Superior Court over that recovered in the Municipal Court was for interest subsequent to the judgment. The declaration was for \$35 on an account annexed of seven items, amounting to \$40 with a credit of \$5. For all that we know the finding in the Superior Court may have allowed no interest at all. It even may have been upon different items from that in the Municipal Court. The question sought to be raised is not before us.

Taxation affirmed.

MAURICE SMITH vs. COMMONWEALTH.

Suffolk. March 20, 1901. — March 21, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Where a prisoner was sentenced for a period longer than authorized by the statute under which he was indicted, the sentence was reversed on writ of error, and the case remanded to the Superior Court for sentence by that court according to law.

PETITION for a writ of error to reverse a sentence of the Superior Court in and for the county of Hampden, passed October 3, 1899, ordering that the petitioner, who had been found guilty of larceny from the person of another, be punished by imprisonment in the State prison for not more than seven years and not less than six years, filed January 21, 1901.

Pub. Sts. c. 203, § 19 provides that "Whoever commits larceny by stealing from the person of another shall be punished by imprisonment in the state prison not exceeding five years, or in the jail not exceeding two years."

P. W. Carver, for the plaintiff in error.

PER CURIAM. The sentence was for a longer period than is authorized by the statute. Pub. Sts. c. 203, § 19.

Judgment reversed.

ORDERED, that the Clerk of the Supreme Judicial Court, for the County of Suffolk, make the following entry, under said case, in the docket of said Court, viz.:

The full Court reverses the sentence of the Superior Court for the County of Hampden, in the case of the Commonwealth v. Maurice Smith and orders the case remanded to said Superior Court for sentence by that Court according to law and a certified copy of this rescript to be sent by the Clerk of the Supreme Judicial Court for the County of Suffolk to the Superior Court for the County of Hampden.

A. MARIA ODDY vs. WEST END STREET RAILWAY
COMPANY.

WILLIAM P. ODDY vs. SAME.

Suffolk. December 11, 1900. — March 29, 1901.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

Street railway companies carrying passengers on ordinary public streets or highways are not negligent in not providing means for warning passengers about to leave a car of the danger of colliding with or being run over by other vehicles in the street.

A street railway car was stopped by the motorman between two stopping places on account of the approach at great speed of a fire engine and a hose cart. A woman passenger who did not know of the alarm of fire and whose destination was the next stopping place, the name of which had been called by the conductor, proceeded to alight from the car and in doing so was struck by the hose cart and injured. When the car began to lessen its speed the conductor, being on the rear platform, found that the fire apparatus was approaching. He looked over the closed gate at the left of the platform and saw the engine pass on that side and continued to look in the same direction for the purpose of seeing when the hose cart would pass. Almost immediately the hose cart passed on the other side where the passenger was alighting. The conductor did not see the passenger as she came from the car to the platform nor until his attention was called to the other side by the passing of the hose cart, when he saw her on the ground. *Held*, that there was no evidence of negligence on the part of the street railway company.

TWO ACTIONS OF TORT, the first to recover for personal injuries sustained by the plaintiff, A. Maria Oddy, from being struck by a hose cart while alighting from a car of the defendant, and the second by the husband of said Maria to recover for the loss of her services and society and expenses of medical attendance on account of her injuries. Writs dated July 16, 1897.

At the trial in the Superior Court, before *Blodgett, J.*, the following facts appeared: The defendant is a common carrier of passengers, and operates a double track line of electric cars through Warren Street in that part of Boston called Roxbury. The cars run on the right hand track as they go. On January, 7, 1897, about eight o'clock in the evening, the plaintiff in the first case, a woman fifty-two years of age, at Dudley Street entered and became a passenger in one of the defendant's outward bound closed cars, called a Warren Street car, intending to ride to Lansing Street, a regular stopping place for that car. The words "right hand" and "left hand" refer to the direction in which the car was going, unless otherwise stated. The car stopped before it reached Lansing Street on account of the approach in front of a fire engine and a hose cart, and remained standing until they passed. The fire engine passed on the left hand side of the car and the hose cart on the right hand side of the car, between it and the curbstone. The plaintiff Maria arose, walked through the rear door of the car and on to the rear platform, and proceeded to alight from the right hand side of the rear platform. There was a gate upon the left hand side. She was struck by the hose cart, thrown to the ground and received the injuries complained of.

Maria Oddy testified in her own behalf, that on the evening of the accident she took a Warren Street car at the Dudley Street transfer station, intending to go to Maywood Street; but Lansing Street was the nearest regular stopping place for Maywood Street, and she intended to get off at Lansing Street. She sat on the left hand side of the car, three or four seats from the rear door. It was dark outside, and the car was lighted. A few seconds after passing Woodbine Street, which is the stopping place next before reaching Lansing Street, she saw the conductor on the rear platform looking into the car through the rear door, which was open, apparently looking in her direction. She raised her hand to signal him to stop. She did not take her eyes from him until she was satisfied he saw her. The car was moving at the usual rate. A few seconds later he called into the car "Lansing Street." She would say she did not open the rear door when she went out. She did not remember having opened it.

"The car seemed to stop in a few seconds after that. As the

car came to a stop, I rose from my seat and stepped towards the door. At that time the car came to a full stop. I stepped off of the platform, turned to the left, got down one step, and was making an attempt to get from the next step to the street, and that is all I remember. . . . I did not reach the ground, according to my best recollection."

She testified that she did not know that there was any engine or hose carriage coming in the street, and that she had not heard any or knew of any alarm of fire at the time; that she did hear the sound of a gong at that time, and thought it was a street car gong on a car coming in the opposite direction; that when she came out, she looked right straight ahead of her and did not remember that she looked to the right or left, saying, "I don't know that I looked both ways."

One Desmond, who at the time of the accident had been in the employ of the defendant as a street car conductor for three years and was the conductor of the car in question, testified by deposition taken by the plaintiff as follows: "The accident occurred on Warren Street, about fifty feet before I got to Lansing Street, as my car was going out from Boston. . . . My car was on its way to Dorchester. The accident happened as follows: The lady that was injured was a passenger on my car. I did not know her name at the time but shortly after I learned it was Mrs. Oddy. It was about eight o'clock in the evening. The first thing that happened was, I noticed what looked like a lighted lamp thrown through a window on Warren Street, then the motorman stopped the car up suddenly. Just before the car stopped I called out Lansing Street. Just after the car stopped a fire engine went by on my left hand side as I was facing the front of the car, that is, as I was facing toward Dorchester, and a hose carriage passed on my right hand side immediately after the engine passed. The hose carriage I should judge was about eighteen or twenty feet behind the engine. I stood on the rear platform looking over the gate on the left side. I did not notice Mrs. Oddy getting off, but just after the hose carriage passed by, I saw her lying on the street right close to the step of the car, right where the hose carriage had just passed by. To the best of my recollection her feet were toward the front end of the car and her head toward the city.

She was right near the rear step on the right hand side of the car as you faced toward Dorchester. I got down and took hold of Mrs. Oddy and lifted her up. . . . The reason I did n't see Mrs. Oddy when she got off my car is that when the fire engine passed on my left I leaned over the gate on that side of the car and looked ahead to see if the hose carriage was coming behind it, and while I was doing that the hose carriage went by on my right, and immediately after, I saw Mrs. Oddy on the street near the step, as I have stated. . . .

"The car was stationary at the time of the accident, and the reason it was standing still was because the motorman stopped it when he saw the engine coming. The car was not supposed to stop until it got to the other side of Lansing Street, so that it was about fifty feet and the width of Lansing Street from a regular stopping place.

"I didn't ring the bell to stop, but I called out the name of Lansing Street before the car stopped; and at the time of calling out the name of that street I should judge the car was about one hundred feet from the nearest side of Lansing Street, that is, in my judgment the car went about fifty feet after I called out the name of 'Lansing Street before it stopped.

"When I called out the name of the street I opened the door of the car, and at that time I was standing on the rear platform of the car. I did nothing more than to open the door of the car and called out the name of the street and closed it again. Mrs. Oddy may have signalled to me to stop the car but I have no recollection of it. I did n't see her get off. . . . From the time the car stopped until the time of the accident, I was on the rear platform of the car on the left hand side looking over the gate, and looking forward to see if the hose carriage was coming. I expected it was coming right after the engine. The horses were right on the run on both the engine and hose carriage, — right on the gallop. They were both going as fast as the horses could run. I think they were going fast enough to go a mile in three minutes. It was directly after the hose carriage passed that I saw the woman on the ground, but the hose carriage was going very fast, and must have been two or three rods back along Warren street toward the city when I saw her."

One Bostwick, a police officer, called by the plaintiff, testi-

fied that at the time of the accident he was standing on the right hand side of Warren Street, about opposite the end of Edgewood Street, the next street before reaching Lansing. He saw the fire apparatus coming and first noticed the car just as it was coming to a standstill. The hose carriage came down on the side of the street next to him. The car stopped before reaching Lansing Street, so that the rear of the car was thirty or forty feet from Lansing Street. He saw a woman step down off the step of the rear platform, and saw her fall back; he could not tell what part of the hose carriage struck her. She had not more than one foot on the ground; he did not think she had both feet on the ground. The hose wagon was going parallel to the tracks, the horse on a gallop. The carriage came within a foot of the step. There was an electric light at the corner of Edgewood Street on the opposite side of Warren Street. He did not remember whether there were any lights in the stores. On cross-examination, he testified, that he had no difficulty in seeing the fire apparatus approaching. He saw the conductor on the rear platform. Heard the gongs on the engine and hose cart. The latter is louder than a street car gong and of a different tone. The practice is for a street car to stop, wherever it is, when fire apparatus is approaching. The hose carriage was a heavy one-horse four-wheeled wagon. The horse did not strike her. He could not tell what part of the carriage struck her. It did not strike the car. The fire apparatus was going as fast as you often see it. The electric light at Edgewood Street throws light at Lansing Street. He did not remember whether any of the stores were open. The engine and hose carriage were making a great deal of noise. The street is not a dark street and was not that night. He heard them (the engine and hose cart) the minute they left Quincy Street, — the minute they left the engine-house. He heard the gongs. They (the engine and hose cart) made considerable noise. The horses on both pieces of apparatus were galloping.

One Fitzpatrick, called by the defendant, testified that he was the motorman on the car, and had been a motorman and driver for twenty-two years. It was the practice always to stop cars when fire apparatus appeared. When he saw the apparatus, it was coming down grade, the engine running on the inward car

track. The engine passed him on his left. The hose cart was approaching in the track in front of him, on which his car was running. He heard the noise of the apparatus coming, but did not remember hearing the bell on the engine nor the gong on the hose cart; he did not take particular notice of that. The hose cart swung to its left and passed on his right, going very fast. When the car stopped, the front end was forty-five or fifty feet from Lansing Street. It was the practice for a conductor to call out the name of a street a reasonable time before reaching it. On cross-examination, he testified that the hose carriage came down the street on the track in front of him, on which his car was running, till it had to turn out. During that period it was right in front of his car, and could not be seen by any one else unless in a position to see it from the front of the car. The hose cart was running pretty nearly a mile in three minutes.

At the close of the evidence the judge was of the opinion that the plaintiffs were not entitled to recover, and directed the jury to return a verdict for the defendant, in each case, under the objection and subject to the exception of the plaintiffs, and reserved the cases for the consideration of this court under the terms and conditions of the following stipulation:

"In these cases verdicts are to be returned for the defendant by order of the court, and they are to be reported to the Supreme Judicial Court for its determination, counsel agreeing in open court that if it shall be held by the Supreme Judicial Court that the plaintiffs were entitled to go to the jury upon the evidence in the case, that judgment shall be entered for the female plaintiff in the sum of \$2,400 without costs, and for the male plaintiff in the sum of \$100 without costs."

H. E. Bolles, for the plaintiffs.

M. F. Dickinson, Jr. & W. B. Farr, for the defendant.

BARKER, J. These actions are on account of injuries received by a passenger as she was leaving a street car by her coming into collision with a hose cart rapidly passing in the street. The car was upon one of two parallel sets of tracks and its rear platform was furnished with gates the one on the side next the other track being closed. The car stopped to receive and deliver passengers only at designated points. After it had passed the last stopping place before that at which the passenger intended to

leave the conductor opened the door from the rear platform, put his head into the car and called out the name of the next stopping place. The passenger thereupon gave him a signal which indicated that she wished to leave the car at the stopping place the name of which had just been called, and saw that the conductor appreciated her signal.

Presently the car slowed up and stopped. As it was slowing up the plaintiff rose from her seat and walked to the rear door reaching the platform as the car came to a standstill and then going down the steps and placing herself in the street, either stepping into the wheel of a rapidly passing hose cart, as one eye-witness who was also a passenger upon the car testified, or being struck by the hose cart as she was leaving the car. The car had not in fact arrived at the stopping place the name of which had been called by the conductor, nor was it in fact stopped in consequence of any order or signal given by the conductor, nor for the purpose of delivering or receiving passengers, but was stopped by the motorman because he saw approaching a fire engine and a hose cart, which were being run to a fire, and were coming toward the car at a high rate of speed in the direction opposite to that in which the car was moving. This stoppage was in accordance with a reasonable practice, in order to avoid collisions between moving cars and fire apparatus driven at high rates of speed. In this instance the hose cart approached upon the same tracks on which the car was. When near the car the hose cart turned to the left and came very near the car. The fire engine passed first, upon the other side, but with a very short interval of time. When the car began to slow up the conductor, being on the rear platform, ascertained that the fire apparatus was approaching. He looked over the closed gate and saw the engine pass, and he continued to look in the same direction to ascertain when the hose cart should have passed. He did not see the passenger as she came from the car to the platform, nor until his attention was called to the other side by the passing of the hose cart when he saw her on the ground. The passenger did not know that there was an alarm of fire, or that fire apparatus was approaching, and the jury might infer that when she rose as the car was slowing up she supposed that it was preparing to stop at the stopping place the name of which had been

called out. She testified that she heard the sound of a gong as she was getting up and walking toward the platform, but that she thought it was a car coming in the opposite direction, and that she had never before been on a car when it stopped to let fire apparatus go by. The time was eight o'clock of the evening of January 7, 1897. The passenger was fifty-two years of age and there is no contention that she was not in full possession of her mental and bodily powers.

At the close of the evidence Mr. Justice Blodgett ordered verdicts for the defendant, counsel agreeing that if this court should hold that the plaintiffs were entitled to go to the jury judgment should be entered for the passenger in the sum of \$2,400 without costs, and for her husband in the sum of \$100 without costs. The cases are here upon the report of the presiding justice, which purports to state all of the material testimony. The passenger herself testified that the car had come to a stop before she reached the platform; that after she got to the platform she was giving her whole attention to getting off the car; that she was looking right ahead and did not see anything in the street; that she thought she took pains to find out whether anything was coming to the right or to the left on the street; that she did not know that she looked both ways or that she turned her head, but that she could see a little to the right and a little to the left without turning her head, and that she was looking to see her way clear to get out of the car and thought it was clear. She was familiar with the street on which the car was, and had lived in the neighborhood eight years before, and she testified that the buildings on the street opposite the place of the accident were about the same at the time of the accident as eight years before. She further testified that she did not remember how dark it was, and that she did not think it was so dark that a person standing on the front of the car could not have seen an approaching hose wagon perfectly well.

We are of opinion that it would not be competent to find the defendant guilty of negligence upon the evidence. It was right for the motorman to stop the car where he did upon the approach of the fire apparatus. It is not customary or necessary to notify passengers of the cause of a stoppage occasioned by an obstruc-

tion in the street. The conductor, while bound to give the passenger an opportunity to leave at the stopping place which she had indicated to him as the point where she wished her journey to end, was not obliged to inform her that that place had not been reached, unless he knew that she was attempting to leave under a misapprehension, and it was his duty to attend to the very things to which he was attending, namely, to ascertain when the obstruction to the progress of the car should cease by the passing of the approaching fire apparatus.

Street car companies carrying passengers in ordinary public streets or highways are not negligent in not providing means for warning passengers about to leave a car of the danger of colliding with or of being run over by other vehicles in the street. The risk of being hurt by such vehicles is the risk of the passenger and not that of the carrier. It is not a danger against which the carrier is bound to protect the passenger or to give him warning.

The cases relied upon by the plaintiffs are none of them cases in which the danger encountered by the passenger upon leaving a street car was merely that of collision with some vehicle not owned or controlled by the carrier and lawfully using the street. In *Bigelow v. West End Street Railway*, 161 Mass. 393, the danger was from an excavation or depression at the stopping place, as was the case also in *Richmond City Railway v. Scott*, 86 Va. 902. *Floytrup v. Boston & Maine Railroad*, 163 Mass. 152, was the case of a passenger upon a steam railroad having its own roadbed and passenger stations, and so was *Treat v. Boston & Lowell Railroad*, 181 Mass. 371. In *Fleck v. Union Railway*, 134 Mass. 480, the passenger was jolted and thrown off from a slippery platform. *Carland v. Young*, 119 Mass. 150, and *Murphy v. Armstrong Transfer Co.* 167 Mass. 199, were the usual cases of foot travellers crossing streets upon which ordinary teams were approaching, the foot traveller being struck after he had gone some distance, and not stepping into the wheel from the curbing or colliding with the vehicle before he had both feet in the street.

In *Maverick v. Eighth Avenue Railroad*, 86 N. Y. 378, the passenger struck by a ladder on a hook and ladder carriage running to a fire was still upon the platform of the street car, and was

being hurried from the car by the conductor with his hands upon her shoulders. See *Chicago West Division Railway v. Mills*, 91 Ill. 39, 42, where it is said that "Passengers, as a matter of prudence, before attempting to get off, should know that the stoppage was for the purpose of letting them get off." See also *Augusta Railway v. Glover*, 92 Ga. 132, 147, for a statement that "no duty touching the selection of a safe place for landing passengers is operative on any stop made on account of an obstruction upon the track."

Judgments for the defendant on the verdicts.

WILLIAM M. MORGAN, trustee, vs. MAURICE M. WORDELL.

Bristol. October 22, 1900. — April 1, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER, HAMMOND, & LORING, JJ.

A partnership of three was dissolved by mutual consent. Under the agreement of dissolution one of them purchased the stock on hand and continued the business. As part of the consideration he agreed to assume all debts and liabilities of the firm, and covenanted to hold the retiring partners harmless from loss on account thereof. *Held*, that a covenant of indemnity ran severally to each of the retiring partners.

A surety, who has paid a claim primarily due from a bankrupt and seeks to prove such payment against the bankrupt as subrogated to the rights of the creditor under § 57 i of the U. S. Bankruptcy Act of 1898, is subject to all the disabilities attached to the creditor whose claim he paid; and if such creditor had received a preference from the bankrupt which he had not surrendered, as required by § 57 g before any claim could be proved by him, this bars the surety from proving his claim by subrogation, although the preference was an entirely separate transaction with which the surety had nothing to do, and it cannot be objected that the adjudication against the creditor as to the preference is *res inter alios* and therefore not evidence against the surety, because the surety stands in the shoes of the creditor and for the purpose of proving his claim is the same person.

Under section 68 of the bankruptcy act, U. S. St. of July 1, 1898, in regard to set-offs and counterclaims, a liquidated mutual credit may be set off by a debtor of the bankrupt sued by the trustee in bankruptcy, notwithstanding the fact that it could not be proved in the bankruptcy proceedings. In the provision of the section above named, that a set-off shall not be allowed which is not provable against the estate, the word "provable" means provable in its nature at the time when the set-off is claimed not provable in the pending bankruptcy proceedings.

CONTRACT by a trustee in bankruptcy to recover \$607 for goods sold and delivered by the bankrupt to the defendant. Writ dated May 29, 1900.

The defendant filed an answer and declaration in set-off, alleging that the bankrupt owed him \$638.48 for money paid for his use and benefit.

The case was heard in the Superior Court upon the following agreed facts: The defendant Wordell was a copartner with Michael J. Dillon and Thomas C. McGuire, engaged in the dry goods business at Fall River under the firm name of Wordell, Dillon and McGuire. The partnership was dissolved by mutual consent on October 17, 1898. Dillon purchased the stock of the old firm under the agreement of dissolution, and carried on the business individually until August 10, 1899, when he became a voluntary bankrupt. The plaintiff was the trustee in bankruptcy of Dillon.

As a part of the consideration from Dillon to the retiring partners he agreed to assume all debts and liabilities of the firm, and covenanted to save the other partners harmless from loss on account thereof.

None of the creditors of the firm released the retiring partners, but all of the creditors were paid by Dillon before going into bankruptcy except three, namely, H. B. Clafin and Company, The Fall River Daily Herald Publishing Company, and the Fall River Daily Evening News, to whom were owed respectively \$738.48, \$40, and \$58.

These three creditors, after Dillon went into bankruptcy and after the appointment of his trustee, demanded payment of each of the retiring partners, who investigated the claims and found that they were still unpaid. Thereupon the defendant Wordell, with knowledge of Dillon's adjudication as a bankrupt, and the appointment of the plaintiff as trustee, paid the Fall River Daily Herald Publishing Company and the Fall River Daily Evening News in full, and paid H. B. Clafin and Company a portion of their claim, namely, \$540.48, paying in all to the three creditors, \$638.48. The other partner, McGuire, at the same time, paid the balance of \$198 due to H. B. Clafin and Company and each took separate receipts running to himself individually for each payment.

After the dissolution of the firm, the defendant bought goods of Dillon to the amount of \$607.06, which were not paid for when Dillon went into bankruptcy. The plaintiff demanded the payment of this sum from the defendant on or before October 1, 1899, but interest was not claimed by either plaintiff or defendant, except from the date of the writ.

In November, 1899, and after his payments to H. B. Clafin and Company and the Fall River newspapers mentioned above, the defendant offered a proof of claim in Dillon's bankruptcy proceedings for the balance of \$31.42, the difference between the amount owed to Dillon's estate and the amount which the defendant claimed was due to him from Dillon's estate, on account of the payments made by him to the three creditors of the partnership. This proof of claim was disallowed in the District Court of the United States by *Lowell, J.*, in a decision rendered March 27, 1900, from which neither party appealed.

The following facts were to be considered only if they were admissible:

H. B. Clafin and Company offered a proof of claim in bankruptcy against Dillon amounting to \$124 for goods sold to him after the dissolution of the partnership and exclusive of the \$738.48 before mentioned, and this claim was disallowed, the referee finding that H. B. Clafin and Company had received a preference under the terms of the bankruptcy act, and this decision became a final judgment. Unless the facts stated in this paragraph are admissible there was no evidence in this case that H. B. Clafin and Company had received a preference.

The retiring partner McGuire owed Dillon for goods purchased after the dissolution the sum of \$198.12, which was not paid at the time Dillon went into bankruptcy. The estate of Dillon was not sufficient to pay his creditors in full.

Upon the foregoing facts the Superior Court ordered judgment for the defendant; and the plaintiff appealed.

Section 68 of U. S. St. of July 1, 1898, is as follows:

"Sec. 68. SET-OFFS AND COUNTERCLAIMS. — a In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

"b A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy."

The case was submitted on briefs to all the justices.

W. M. Morgan & H. T. Richardson, for the plaintiff.

J. W. Cummings & C. R. Cummings, for the defendant.

HOLMES, C. J. This is a suit by a trustee in bankruptcy against a debtor of the bankrupt. The debtor claims a set-off on the ground that since the bankruptcy he has paid debts due from a former partnership consisting of himself, the bankrupt and one McGuire, from which debts the bankrupt had covenanted to save his partners harmless. It is objected that the covenant runs to the two other partners jointly, but it is sufficiently plain that there are several covenants to each. The more serious objection is that the principal debt paid is one which has been disallowed by final judgment when offered by the creditors, H. B. Claflin and Company, for proof against the estate, on the ground that they received a preference, and that a claim offered in the defendant's name in respect of the payment also has been disallowed.

As it was assumed on both sides that the provision in § 68 b of the United States Bankruptcy Act concerning set-off is more than a rule of procedure and governs in this court as well as in the courts of the United States, we shall make the same assumption for the purposes of this case, without argument. See *Hunt v. Holmes*, 16 Nat. Bankr. Reg. 101, 105; *Partridge v. Insurance Co.* 15 Wall. 573, 580. We shall assume further, as a corollary, that if a set-off is to be maintained it must be brought within the words of the section referred to. Those words are: "A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate." These words are universal in form, and we do not see how a set-off can be claimed in this case outside of them.

If then the defendant claims by virtue of the rights of a quasi-

surety, (*Fisher v. Tift*, 127 Mass. 313, 314,) who has paid and therefore is subrogated to the claim of a joint creditor of himself and the debtor, § 57 i, the trouble is that he has to take the claim of Claflin and Company as he finds it, and he finds it a claim which is not provable against the estate, because Claflin and Company have received preferences which have not been surrendered. § 57 g. It seems hard that a matter between Claflin and Company and the bankrupt, with which the defendant had nothing to do, should bar rights arising out of a payment which he was compelled to make. But we do not feel at liberty to give the language of § 57 i other than its most natural meaning or to interpret the subrogation there provided for as a subrogation free from the disabilities attached to the creditor or as a subrogation to the creditor's rights independent of the effect of the preference upon them. One result of such an interpretation would be to allow the claim without a surrender of the preference, contrary to § 57 g.

It is suggested that the adjudication against Claflin and Company is *res inter alios*, and there is no other evidence that they accepted a preference. But the defendant's claim by subrogation is affected by the judgment as it is by the preference, and for the same reason: He stands in the shoes of Claflin and Company, succeeds to their place, in the language of the Roman law, and is the same person with them for this purpose, a notion frequently recurring in the law. Dernussou, *de la Subrogation*, (3d ed.) c. 1, no. 7. Sheldon, *Subrogation*, § 2. 4 Massé, *Droit Commercial*, (2d ed.) 60, no. 2152. D. 20, 4, 12, § 9. D. 4, 12, 16. See *Day v. Worcester, Nashua & Rochester Railroad*, 151 Mass. 302, 307, 308.

The defendant also claims a set-off by virtue of his covenant. We assume that it has been adjudicated between the parties in the District Court that the defendant has not a claim which he could prove in his own name, and that this decision carries with it the corollary that he could not prove his claim on the covenant against the estate. If therefore the prohibition of a set-off of a claim "which is not provable against the estate" is to be taken with simple literalness as applying to any claim that could not be proved in the existing bankruptcy proceedings, the defendant's set-off cannot be

maintained. But we are of opinion that the seemingly simple words which we have quoted must be read in the light of their history and in connection with the general provision at the beginning of § 68 for a set-off of mutual debts "or mutual credits," and that so read they interpose no obstacle to the defendant's claim.

The provision for the set-off of mutual credits is old. St. 4 & 5 Anne, c. 17, § 12. 5 Geo. II. c. 30, § 28. 46 Geo. III. c. 135, § 3. *Gibson v. Bell*, 1 Bing. N. C. 748, 753. *Ex parte Prescott*, 1 Atk. 230. It was adopted in the United States acts of 1800, c. 19, § 42, 1841, c. 9, § 5, and 1867, c. 176, § 20. But while the provision as to mutual credits was thought to be more extensive than that as to mutual debts, *Atkinson v. Elliott*, 7 T. R. 378, 380, it was held that even the broader phrase did not extend to claims which, when the moment of set-off arrived, still were wholly contingent and uncertain, such for instance as the claim upon this covenant would have been if the defendant had not yet been called upon to pay anything upon the original partnership debt. *Abbott v. Hicks*, 5 Bing. N. C. 578. Robson, Bankruptcy, (7th ed.) 374. But the moment when the set-off was claimed was the material moment. The defendant's claim might have been contingent at the adjudication of bankruptcy, and so not provable in the absence of special provisions such as are to be found in the later bankrupt acts in England and in the United States act of 1867, although not in the present law, and yet if it had become liquidated, as here by payment, before the defendant was sued, he was allowed without question to set it off. *Smith v. Hodson*, 4 T. R. 211. *Ex parte Boyle, re Shepherd*, 1 Cooke, B. L. (8th ed.) 561. *Ex parte Wagstaff*, 13 Ves. 65. *Marks v. Barker*, 1 Wash. C. C. 178, 181.

The limitations worked out by these decisions were expressed in the section of the act of 1867 cited above, in the words "but no set-off shall be allowed of a claim in its nature not provable against the estate." These words, as it seems to us, following the cases, referred to the nature of the claim at the moment when it was sought to set it off, not to its nature at the beginning of the pending bankruptcy proceedings, and did not prevent a set-off of a claim which was liquidated at the

later moment merely because, when the bankruptcy proceedings began, for some reason it did not admit of proof. The present statute leaves out the words "in its nature," but we can have no doubt that it was intended to convey the same idea as the longer phrase in the last preceding act, from which in all probability its words were derived. "Provable" means provable in its nature at the time when the set-off is claimed not provable in the pending bankruptcy proceedings.

The right to set off the claim when liquidated after the beginning of the bankruptcy proceedings was based upon its being a mutual credit, not upon the claim being provable, which it was not until the later bankruptcy statutes. *Russell v. Bell*, 8 M. & W. 277, 281. Conversely, of course the exclusion of a set-off, when the claim still was contingent and the defendant had made no payment, did not stand on the ground that the claim was not provable in the existing bankruptcy proceedings, but on the ground that it was not provable in its nature and that there was no machinery available to liquidate it. If we are right in supposing that the act of 1867 meant merely to codify a principle or rather a limitation developed by the courts, and that the words of the present act mean no more than those of the act of 1867, it follows that, although the defendant's claim could not have been proved against the estate, still it is a mutual credit and may be set off when he is sued.

Judgment for defendant.

WILLIAM A. WISHART vs. JOSEPH McKNIGHT.

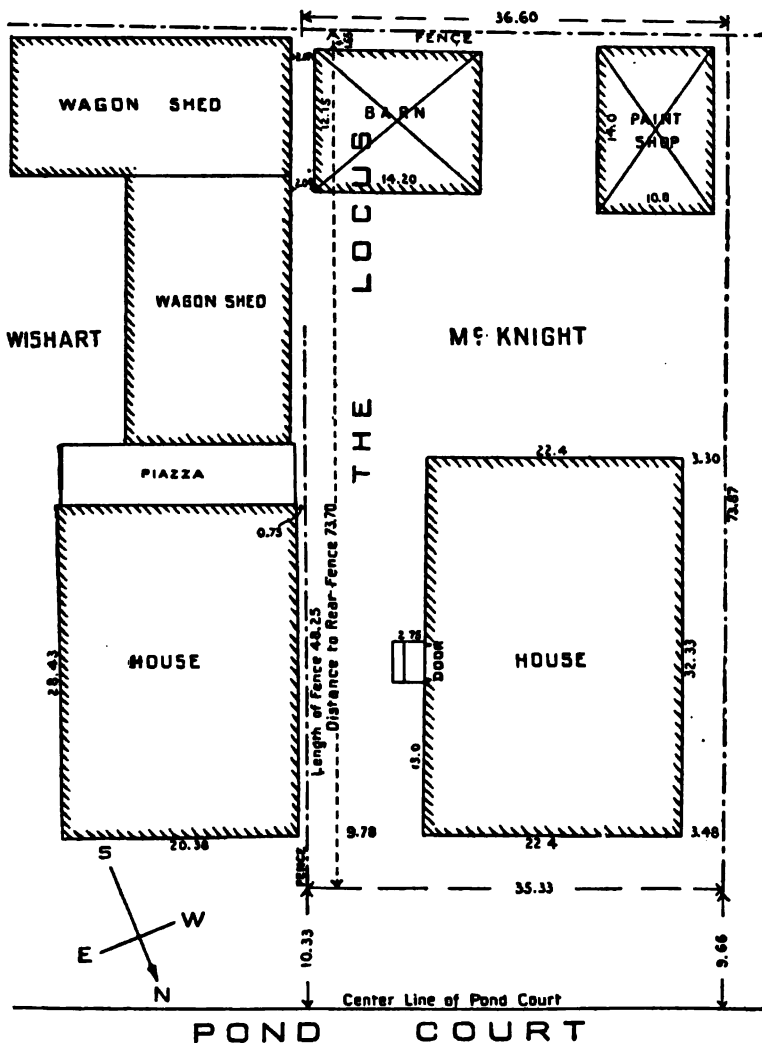
Suffolk. November 22, 1900. — April 1, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER,
HAMMOND, & LORING, JJ.

Successive grantors may transfer their possession of a strip of land successively and continuously occupied as part of the granted premises but not included in the description in any of the deeds, and by such continuity of possession for twenty years a title by limitation may be acquired. *Sawyer v. Kendall*, 10 Cush. 241, distinguished, and dicta in earlier cases founded on *Potts v. Gilbert*, 3 Wash. C. C. 475, disapproved.

WRIT OF ENTRY to recover a strip of land ten feet wide lying on the westerly side of the demandant's dwelling-house on Pond Court in the town of Clinton. Writ dated July 20, 1897.

The tenant had occupied the demanded premises for many years, but less than twenty years, and to the demandant's writ



pleaded title to the demanded premises. The above plan was copied from a plan used at the trial and at the argument before this court.

At the trial in the Superior Court, before *Fessenden, J.*, the demandant put in evidence deeds which showed that he held the record title to the land demanded. The tenant offered in evidence certain deeds under which he claimed title, through mesne conveyances, from one William Speakman under a deed from Hannah Speakman's executor, dated January 10, 1874.

The tenant offered evidence tending to show that his predecessors in title, successively the grantees under the Speakman deed and mesne conveyances, had occupied the demanded premises which adjoined the land conveyed by the terms of the deed and mesne conveyances; and further offered to show that a fence had been maintained by himself and his predecessors in title, enclosing the demanded premises as part and parcel of the premises and dwelling occupied by the tenant and his predecessors; and that this fence had been thus maintained for a period of more than twenty years before the bringing of demandant's writ. That no one of his predecessors, nor the tenant himself, had alone occupied for any continuous period of twenty years the land to which they thus claimed title.

It was agreed that the demanded premises were not covered by any word or any terms of description in any of the deeds, through or under which the tenant claimed title.

The judge thereupon excluded the evidence offered, but admitted evidence offered by the tenant tending to show, that a door appearing upon the side of the tenant's house, as shown by the photograph used at the trial, had existed as it there appeared for a period of more than twenty years before the bringing of the demandant's writ. To the exclusion of the other evidence offered by the tenant the tenant excepted. The photograph is not reproduced, but the situation of the door, with steps extending from it into the locus, is shown on the above copy of the plan.

The demandant's deeds, which were put in evidence, showed that his predecessors in title had the record title by specific description in those deeds to the demanded premises prior to any conveyance of the estate now owned by the tenant to any of the tenant's predecessors who had occupied the demanded premises.

The judge found for the demandant; and the tenant alleged exceptions.

The case was submitted on briefs to all the justices.

J. W. Corcoran & W. B. Sullivan, (A. G. Buttrick with them,)
for the tenant.

H. Parker & H. H. Fuller, for the demandant.

LORING, J. It appears from the photograph and plan made a part of the bill of exceptions that the demanded premises consist of a strip of land ten feet wide between the dwelling-houses of the demandant and of the tenant, running from Pond Court, on which those houses front, to the rear line of the lots; that the rear of the locus is covered by a barn, used and occupied by the tenant, which is in part on the locus and in part on the land to which the tenant, without question, has a good title; and further, that the tenant's only access by wagon to the barn is over the locus, his dwelling-house being within three and a half feet of the other, that is, the westerly, side line of his lot. From the deeds put in evidence, it appeared that the record title to the locus was in the demandant. The tenant introduced in evidence various deeds covering the land on which his dwelling-house stands, but not covering the ten-foot strip in question, the first of these deeds being dated January, 1874; he offered to show that for twenty years prior to the date of the writ, July 20, 1897, each of the grantees in said deeds had occupied the demanded premises and had maintained a fence enclosing them as part and parcel of the premises and dwelling-house occupied by them. It was admitted that no one of these grantees had occupied the locus for a continuous period of twenty years, and that the locus was not covered by the description of the land contained in any of these deeds. This evidence was excluded, against the exception of the tenant, and the court found for the demandant. This evidence would have warranted the jury in finding that each of the grantees transferred to his successor his possession of the strip of land in question, and that thereby the demandant was continuously kept out of possession.

The ruling in the court below evidently was made on the authority of *Sawyer v. Kendall*, 10 Cush. 241, following dicta in the previous cases of *Ward v. Bartholomew*, 6 Pick. 409, 415, *Allen v. Holton*, 20 Pick. 458, 465, *Melvin v. Proprietors of Locks & Canals*, 5 Met. 15, 32, and *Wade v. Lindsey*, 6 Met. 407, 418, cited in that case.

Where possession has been actually, and in each instance, transferred by the one in possession to his successor, the owner of the record title is barred from maintaining an action to recover the land.

In some cases this conclusion has been reached on the ground that in such a case there is the necessary privity or continuity of possession between the successive trespassers within the doctrine on which *Sawyer v. Kendall* was decided. *Weber v. Anderson*, 73 Ill. 439. *Faloon v. Seinshauer*, 180 Ill. 649. *Smith v. Chapin*, 31 Conn. 530. *Schrack v. Zubler*, 34 Penn. St. 38. *Chilton v. Wilson*, 9 Humph. 399, 405. *Vandall v. St. Martin*, 42 Minn. 163. *Crispen v. Hannavan*, 50 Mo. 536. *Adkins v. Tomlinson*, 121 Mo. 487, 494. *Coogler v. Rogers*, 25 Fla. 853, 882. *Rowland v. Williams*, 23 Or. 515. *Shuffleton v. Nelson*, 2 Sawyer, 540. *Winn v. Wilhite*, 5 J. J. Marsh. 521, 524.

There are other cases which reach the same result by a different road. These cases go on the ground that the position of a tenant, who seeks to make out the defence of the statute of limitations by proving the possession of a succession of persons, is not like that of one who seeks to establish an easement by showing that a succession of persons had prescribed for it. These cases hold that in case of the defence of the statute of limitations the only question is, whether the demandant has been kept out of possession continuously for the legal time, not whether the persons who kept him out of possession held one under the other. *Carter v. Barnard*, 13 Q. B. 945, 952. *Dixon v. Gayfere*, 17 Beav. 421, 430. *Willies v. Howe*, [1893] 2 Ch. 545, 553. *Fanning v. Wilcox*, 3 Day, 258. *McNeely v. Langan*, 22 Ohio St. 32. *Shannon v. Kinney*, 1 A. K. Marsh. 3. *Scheetz v. Fitzwater*, 5 Penn. St. 126. And see *Chapin v. Freeland*, 142 Mass. 383, 387; *Harrison v. Dolan*, 172 Mass. 395, 397.

Where possession of land has been held for the statutory period by successive disseisors or trespassers, the defence of the statute is not made out if the possession has not been continuous, because where a disseisor in fact abandons his possession and leaves the land vacant, the seisin of the true owner reverts; there is a new departure from that time, and the owner can rely on his new seisin by reverter as the ground of an action within the statutory period. *Agency Co. v. Short*, 13 App. Cas. 793. *Sol-*

ling v. Broughton, [1893] A. C. 556, 561. *Cunningham v. Patton*, 6 Penn. St. 355, 358, 359. *Louisville & Nashville Railroad v. Philyaw*, 88 Ala. 264, 268. *Jarrett v. Stevens*, 36 W. Va. 445, 450.

In *Sawyer v. Kendall* the lot in controversy had been set off to the grantor of the demandant, and the lot next to it to the tenant, in the partition of their father's estate made by commissioners duly appointed. The premises in controversy and the parcel of land set to the tenant were then enclosed by one fence, and so remained until the lot in controversy was conveyed to the demandant. He put up a fence between the two lots and brought the writ of entry to recover possession of his lot in the same month in which it was conveyed to him, namely in March, 1848. Both lots "were mostly used as pasture land, and were approached in two ways, both of which led across the latter [the demanded premises]. The tenant proved that during the life of her husband the premises in dispute, and the parcel set to her, had been used by him, and since his death by her, by turning cattle into the parcel set to the tenant; and that they thence went into and depastured the tract in controversy. It also appeared that the tenant had gathered apples from the trees on the latter place, and driven cattle over and across the same. This use, as aforesaid, was exercised by the husband of the tenant from 1820 till 1832, and from that time till the date of the writ, by the tenant herself; more than thirty years in the whole."

Sawyer v. Kendall, therefore, was a case where no continuity of possession had been made out by the tenant, and the decision was finally put upon that ground. After stating that during her coverture the tenant could commit no act of disseisin, and that until the death of her husband he was in possession by his own act of disseisin, the opinion is as follows: "She shows no deed or devise of the land to herself by her husband. Upon his death, therefore, the seisin was in his heir at law, or the seisin of the true owner revived, and the subsequent disseisin by her was her own separate act, unconnected with the previous disseisin of her husband."

It would be going very far to hold that the possession of the husband and that of his wife after his decease were continuous, where the only act relied on to make out adverse possession con-

sists in turning out on the tenant's land cows which stray thence on to the land in controversy, — there being no fence between the two, — supplemented by an occasional gathering of apples from the demandant's land. *Sawyer v. Kendall* went no farther than that.

We are of opinion that that case is to be confined to the point actually decided, and cannot be held to be an authority for all the statements in the opinions in that case and in the cases cited.

Where a trespasser in possession of land actually transfers his possession to another, or where one disseisor is disseised by another, it is not true, as was held in *Potts v. Gilbert*, 3 Wash. C. C. 475, that there is in contemplation of law of necessity a momentary reverter of seisin to the true owner, for the reason that a trespasser or a disseisor has nothing which he can transfer to another. *Potts v. Gilbert* was a decision of the Circuit Court of the United States sitting to try an action of ejectment to recover land in the State of Pennsylvania; the decision was promptly repudiated by the Supreme Court of that State in *Overfield v. Christie*, 7 S. & R. 173, and had ceased to be an authority when first cited in this Commonwealth in *Allen v. Holton*, 20 Pick. 458. See also the subsequent cases of *Scheetz v. Fitzwater*, 5 Penn. St. 126, 181; *Moore v. Small*, 9 Penn. St. 194, 196. It is settled that one who has the possession of land is thereby invested with a right to that land which, in the absence of a better title, will be enforced by law; *Slater v. Rawson*, 6 Met. 439; *Hubbard v. Little*, 9 Cush. 475; *Currier v. Gale*, 9 Allen, 522; *Pollock & Wright on Possession*, 95–98; and this possession and the right arising out of it may be transferred *in pais* to another.

Exceptions sustained.

DAVID F. WHITE vs. BLANCHARD BROTHERS GRANITE COMPANY.

Worcester. January 7, 1901. — April 1, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER, HAMMOND, & LORING, JJ.

An abutter on a highway in a town, owning the fee to the centre of the way subject to the public easements, has no ownership in the highway that is affected by the construction and maintenance thereon under Pub. Sts. c. 112, §§ 223, 224, by a quarry company with the consent of the selectmen of the town, of a freight horse railroad for the transportation of stone from the quarry of the company to a steam railroad about a mile distant for distribution to purchasers. This is the use of an easement taken when the highway was created.

The provisions of Pub. Sts. c. 112, §§ 223, 224, permitting a person or corporation to construct a railroad upon a highway for private use in the transportation of freight subject to the approval and regulation of the city or town wherein it is to be constructed, is constitutional. And where with the consent of the selectmen of a town a freight horse railroad was constructed by a quarry company under the sections above named, for the transportation of stone from the quarry of the company to a steam railroad about a mile distant for distribution to purchasers, it was *held*, that this was not a taking of the property of the owner of the fee of the highway. The transportation of its stone over the highway by the quarry company was done by it as one of the public under proper regulations by the selectmen, and it might be better for the condition of the road and more for the interest of the public that the stone should be carried over the road on iron rails, than that the surface should be rutted by the wheels of heavily loaded wagons.

BILL IN EQUITY by an abutter on the old Boston and Hartford turnpike highway, so called, in the town of Uxbridge in the county of Worcester, owning the fee to the centre of the portion of said highway adjoining his land, against the Blanchard Brothers Granite Company, a corporation engaged in the business of quarrying stone at Uxbridge, to enjoin the defendant from building and maintaining upon said highway and over the plaintiff's land a permanent railroad for the private use of that company in the transportation of freight only, filed August 6, 1900.

The case came on to be heard before *Morton, J.*, who reserved it upon the bill and answer and agreed facts for the consideration of the full court, such disposition to be made of it as to that court should seem meet.

The agreed facts were as follows :

The plaintiff is and for many years has been the owner in fee of a certain parcel of land in the town of Uxbridge in the county of Worcester, situated on the southerly side of the old Boston and Hartford turnpike highway, so called, in Uxbridge, which is and has been for many years a public highway, and bounding northerly on that highway for about one hundred and thirty feet.

The plaintiff's and his predecessors' deeds describe the plaintiff's parcel of land in such a way as to make the plaintiff the owner of the fee in the highway to the centre thereof, subject to the general and ordinary rights of the public in highways.

The defendant is a corporation duly established by law, owning a stone quarry in Uxbridge about one mile west of the Worcester division of the New York, New Haven and Hartford Railroad. The larger part of the defendant's business is quarrying stone for railroad, bridge and construction purposes outside of Uxbridge, and the product of its quarry is largely transported on that railroad.

The defendant, for the purpose of facilitating the transportation of its product from its quarry to the railroad, under the provisions of Pub. Sts. c. 112, §§ 223, 224, made application to the selectmen of Uxbridge for their consent to the building of a railroad by the defendant upon and along the southerly side of the above named highway, for the use of the defendant in the transportation of freight from its quarry to the railroad, and after due notice and hearing the selectmen granted and gave their consent to the defendant to build such railroad, and ordered that it should be built on the southerly side of the highway sixteen feet northerly of the southerly line of the highway, and also ordered that such railroad should be built and operated subject to the following regulations, being the regulations material to the issue in this cause, namely :

" A. No rails shall be used except girder rails, and the space between said rails and for eighteen inches on the outer side of each rail shall be macadamized to the approval of the selectmen.

" B. No motive power shall be used except that of horses, and every car drawn over said highway shall be preceded, at a safe distance, by a flagman, and said car shall not be run at a speed exceeding three miles per hour.

"C. No car shall be run over said highway between the hours of 8 and 9 A. M., 11.30 A. M. and 1 P. M., and 3.30 and 5 P. M."

The consent of the selectmen was given before the bringing of the plaintiff's bill.

No change in the grade of the highway opposite the plaintiff's premises was proposed, and none of the plaintiff's land outside of the highway is crossed or entered upon by the defendant's railroad. The plaintiff will be damaged only so far as he may be inconvenienced and his real estate depreciated in value by having such a railroad run in the street opposite his premises; and an elm tree may be injured by the construction of the railroad.

The plaintiff never has consented to the construction of the railroad, but has protested against it. The railroad has practically been completed between the quarry and the Worcester division, except opposite the plaintiff's premises. The defendant has at no time paid or tendered payment for injury to the plaintiff's premises or threatened injury to the same or for the use of the highway as proposed by the defendant.

The sections of Pub. Sts. c. 112 above referred to are entitled "RAILROADS FOR PRIVATE USE" and are as follows:

"Sect. 223. A person or corporation may construct a railroad for private use in the transportation of freight, subject to the provisions of the following section; but shall not take or use lands or other property therefor without the consent of the owner thereof.

"Sect. 224. No such road shall be connected with the road of a railroad corporation without its consent; nor constructed across or upon a highway, town way, or travelled place, without the consent of the mayor and aldermen of the city or selectmen of the town, nor except in a place and manner approved by them. If the mayor and aldermen or selectmen consent, they shall from time to time make such regulations in regard to the motive power to be employed, the rate of speed to be run, and the time and manner of using the road over and upon such way or travelled place, as in their judgment the public safety and convenience require, and they may order such changes to be made in the track as are rendered necessary by the alteration or repair of such way. If they allow steam-power to be used on such

road, the provisions of this chapter relating to the crossing of ways and travelled places by railroad corporations shall apply to such road and to the person or corporation constructing or operating the same."

The case was submitted on briefs to all the justices.

W. M. Prest, for the plaintiff.

R. B. Dodge & W. J. Taft, for the defendant.

KNOWLTON, J. The railroad of the defendant corporation is to be constructed in all particulars in accordance with the Pub. Sts. c. 112, §§ 223, 224, unless the construction of such a railroad upon a public highway, the fee of which is owned by the abutting landowner, is a taking and use of land of such owner without his consent. The selectmen of Uxbridge, in consenting to the construction of the railroad and in making regulations in regard to it, have assumed that the plaintiff has no ownership of the highway that is affected by this use of it. Of course, if the construction of such a railroad along the road is a taking and use of the plaintiff's property without his consent, the statute, as applied to this case, is unconstitutional; for it contains no provision for compensation.

The decision of the case must turn, therefore, on two questions: first, what rights of property has a landowner in his land which has been taken and appropriated to use as a public highway; and second, what effect, if any, does the construction of such a railroad as this along the highway have upon these rights. The public authorities may use a highway in any proper manner which is reasonably incident to the appropriation of it to public travel, and to the ordinary uses of a street or road under different conditions. The owner of the fee from whom the easement is taken may use his land in any way which is not inconsistent with the paramount right of the public to use it, and this paramount right may include the laying of gas or water pipes, of sewers, and of street railway tracks, the setting of posts for the support of electric wires, or any other use of a public nature which is incident to the location and maintenance of the street. *Callender v. Marsh*, 1 Pick. 418. *Pierce v. Drew*, 186 Mass. 75. *Howe v. West End Street Railway*, 167 Mass. 46. *Como v. Worcester*, 177 Mass. 543. It is often difficult to determine whether a new use of a highway is an interference with

the right of property of the owner of the fee, which entitles him to damages ; but in this Commonwealth a taking of land for a street or highway has always been given an effect which is liberal to the public in reference to different uses to which they may at any time desire to put it. See *Howe v. West End Street Railway*, 167 Mass. 46, and cases cited.

If the use in this case, to which the selectmen have consented under the authority of the statute, is in its nature a public use, and is not more burdensome than other public uses which have been held to come within the possible contemplation of the authorities in laying out highways, it is not an encroachment upon the right of the plaintiff as owner of the fee. By the facts agreed it seems to be less burdensome than ordinary electric railways, such as have become common in all parts of the State, the construction of which is held not to impose an additional servitude upon the land included in a public way. The track and rails are not different from those of street railways, there are no posts or wires, the cars are to be propelled by horses, every car is to be preceded at a safe distance by a flagman, no car is to run at a speed exceeding three miles an hour, and the cars are allowed to be run only at certain hours of each day.

The use of a highway for the transportation of merchandise to be used by different purchasers in many places is a public use, and the defendant corporation in carrying its stone over the road is doing it as one of the public. It may be better for the condition of the road, and more for the interest of the general public, that the products of this quarry should be transported over the road on iron rails, than that the surface should be rutted with the wheels of heavily loaded wagons. The Legislature was well warranted in recognizing that this kind of use of a highway might be a proper public use of it, and the selectmen have kept well within the statute in prescribing regulations.

The plaintiff suffers no damage for which he is entitled to compensation. For the changed public use of the way he is presumed to have received compensation when the way was laid out. *Callender v. Marsh* and *Como v. Worcester, ubi supra*. There is to be no change of grade opposite to his premises, and no action which will entitle him to damages under Pub. Sts. c. 52, § 15, or c. 49, §§ 15, 16, 68. The case falls within the decisions

in *Callender v. Marsh*, *ubi supra*. *Purinton v. Somerset*, 174 Mass. 556. *Vigeant v. Marlborough*, 175 Mass. 459. It is not within the exception created by the statutes last above cited.

A majority of the court are of opinion that the proposed action of the defendant is authorized by the statute and by the consent of the selectmen, and that the statute, as applied to this kind of a railroad, is constitutional.

Bill dismissed.

WILLIS H. KENNY vs. INHABITANTS OF IPSWICH.

Essex. November 8, 1900. — April 2, 1901.

Present: HOLMES, C. J., KNOWLTON, LATHROP, BARKER, & HAMMOND, JJ.

Exceptions will not be disallowed or dismissed on the ground that the request for a ruling refused by the presiding judge was not shown to the counsel on the other side and that it was not known to him that the ruling was asked for or an exception to the refusal to give it taken, he all the time being present in court. *Semble*, however, that the general practice, that each party to a case should know what requests are made by the other party and should have an opportunity to be heard thereon if he so desires, is founded in justice and should be followed as the proper course.

Whether and to what extent a highway must be made safe and convenient for persons riding on bicycles, *quære*.

Semble, that in an action against a town for an injury suffered from an alleged defect in a highway, the facts, if proved, that the plaintiff was riding a bicycle in the dark without a lamp outside the travelled part of the highway would warrant a jury in finding that he was not in the exercise of due care.

In an action for personal injuries, where the question of the due care of the plaintiff is in issue, the presiding judge properly may refuse a request which singles out certain circumstances and asks the judge to rule upon their effect on the question of the due care of the plaintiff, apart from other circumstances bearing upon the same issue, although the ruling requested may be correct as an abstract proposition; and such refusal especially is justified when the request is made after the judge's charge.

TORT for personal injuries alleged to have been caused by a defect in a highway of the defendant while the plaintiff was riding a bicycle thereon. Writ dated October 21, 1898.

At the trial in the Superior Court, before *Bell, J.*, it was admitted that the town was bound to keep in repair the road on which the plaintiff was riding. Due notice of the time and

place and cause of the accident was given the defendant. The evidence of the plaintiff tended to show the existence of a gully, beginning in the travelled part of the highway near the centre and extending to a concrete gutter on the right-hand side of the way as the plaintiff was travelling; that this gully was caused by the flow of surface water after a rain; that the way was wrought to the edge of the gutter, and that this was the place and the occasion of the accident. The plaintiff and a companion were riding their bicycles from Ipswich toward Danvers when the accident occurred at the foot of a hill.

The presiding judge, in the course of his charge, instructed the jury as follows: "There is another element of chance then comes in, — was the plaintiff in the exercise of due care? Due care means such care as an ordinarily reasonable man would exercise under the same circumstances, and if he was using that care, then, so far as that point is concerned, he would be entitled to recover. The circumstances are these: Of course he was riding a bicycle; he was riding somewhere in the neighborhood of eight o'clock in the evening; he was riding down this hill, and upon this place upon which you find upon the evidence he was riding, and he was riding at the speed which the evidence justifies you in finding. He says he was riding seven miles an hour, and his friend says seven or eight miles an hour, and it is argued by the defendant that he must have been riding at a higher rate of speed, but you will say, if he was riding at such a rate of speed as a reasonable man would ride under the circumstances as you find them to be, he can recover; if he was not, he cannot recover; because then his own negligence contributed to the accident." The judge fully charged the jury upon other questions arising in the case in terms to which no exception was taken.

At the conclusion of the charge, the defendant requested the judge to give the following instruction which was the only instruction requested:

"If the jury find that at the time of the accident the plaintiff was riding a bicycle in the dark, without a lamp, outside the travelled part of the highway, such facts will warrant the jury in determining that the plaintiff was not in the exercise of due care."

This request was refused. The plaintiff's counsel was present in court, but the request was not shown to him, and he was not aware that the instruction was asked for or that an exception was taken to its refusal. The jury found for the plaintiff; and the defendant alleged exceptions.

The counsel for the plaintiff filed and was heard upon the following motion:

"Now comes the plaintiff in the above entitled action and moves that the defendant's exceptions be disallowed and dismissed for the following reasons. First. Because the defendant's counsel did not notify the plaintiff's counsel that he intended to make any request for a ruling or instruction at that time or at any time. Second. Because he did not exhibit or make known to the plaintiff's counsel the ruling requested of the court at the time of said request or at any time before the case was given to the jury. Third. Because the plaintiff's counsel was not notified by the defendant's counsel that any request had been made or refused or any exception had been taken to a refusal to instruct the jury as requested by the defendant, until after the verdict. Fourth. Because the plaintiff's counsel was in no wise made aware of the request for a ruling made by the defendant of the ruling requested or the refusal to rule by the court or of any exception taken by the plaintiff to such refusal to rule as requested, either by the defendant's counsel or by the court, although the plaintiff's counsel was in his place at the time of said request. Fifth. Because said request was made of the presiding justice by the defendant's counsel, at the judge's bench as the jury was about to take the case, in a low tone of voice that could not be heard by the plaintiff's counsel."

The judge denied the motion and allowed the defendant's exceptions.

A. P. White, (*G. H. W. Hayes* with him,) for the defendant.

D. N. Crowley, for the plaintiff.

HAMMOND, J. This is an action of tort to recover for injuries alleged to have been occasioned to the plaintiff by reason of a defect in a highway which the defendant was bound to keep in repair. At the time of the accident the plaintiff was riding upon a bicycle and was thrown from it by its contact

with a gully in the way. At the close of the charge the defendant presented a certain request for a ruling, which request was refused by the court and the defendant excepted. The plaintiff's counsel was present in court, but the request was not shown to him and he was not aware that the instruction was asked or that an exception was taken to the refusal of the court to give it. Afterwards the plaintiff moved in writing that the defendant's exceptions be "disallowed and dismissed" for reasons set forth in the motion. This motion was denied and the plaintiff appealed. It does not appear except as above stated whether the motion was denied because the court did not find the facts as set forth in the motion, or because the court ruled that the facts set forth did not require, as matter of law, that the exceptions should be disallowed; and therefore in considering the appeal we can only consider whether the facts set forth in the record, namely, that the request was not shown to the counsel for the plaintiff, and it was not known by him that the instruction was asked for and an exception was taken, he all the time being present in court, require that the exceptions should be "disallowed or dismissed."

Pub. Sta. c. 153, § 8, provides that "in all cases civil or criminal, . . . a party aggrieved by an opinion, ruling, direction, or judgment of the court in matters of law may allege exceptions thereto, and shall not be required in a jury trial to allege the same in writing before the jury retires to consider the cause." Subsequent sections of the same chapter provide for the taking, filing and allowance of exceptions, but nothing material to the point now under consideration; and the same remark may be made of the rules of the Superior Court. See Superior Court Rules, 47, 48.

In the trial of a case, especially before a jury, it frequently happens that a party will prefer that a ruling unfavorable to him, requested by the other party, should be given even although he believes it to be an inaccurate statement of the law. He may feel confident of a verdict in his favor, even if the ruling unfavorable to him be given, or he may prefer at any rate to take his chances of a verdict against him rather than to be delayed, in reaping the fruits of a verdict should it be in his favor, by exceptions taken by the other side to the refusal of the court

to give the ruling requested; or more frequently he may be anxious to be heard upon any ruling requested so as to be sure that so far as in him lies the court shall state the law fairly so far as respects his interest. For these and other reasons it is reasonable and proper that each party to a case shall know what requests for rulings are made by the other party, and shall have an opportunity to be heard thereon if he so desires. But the practice has not always been strictly followed. Sometimes the request is of such a nature that the court is justified in assuming that the other side will object to the ruling requested. Sometimes, when the request is presented at the end of the charge, there is considerable noise and confusion attendant upon getting the papers together for the jury and in sending out the jury, so that even where all the counsel are in the court room one may fail to hear what the other says to the court, or all which is said by the court; and thus it may happen that requests are refused and exceptions taken by one party without the knowledge of the other although the court thinks and is justified in thinking that all the proceedings are known to both.

In actual practice it would be extremely inconvenient to make the allowance of an exception to the refusal to give a ruling requested depend in any degree upon the ability of the excepting party to prove that his adversary knew of the request and of the refusal to give it. It is only in comparatively rare cases that each party does not know what exceptions are taken in the case. Practically, counsel will find no difficulty in ascertaining before the retirement of the jury what exceptions have been taken and what is their general nature. For these and other obvious reasons, we cannot say that upon the facts stated in the record there was error of law in denying the plaintiff's motion. At the same time we think that the general practice is founded in justice, and should be followed as the proper course.

The exception taken by the defendant was to the refusal of the court to rule that "If the jury find that at the time of the accident the plaintiff was riding a bicycle in the dark, without a lamp, outside the travelled part of the highway, such facts will warrant the jury in determining that the plaintiff was not in the exercise of due care." This request was presented at the conclusion of the charge. In the charge the court had in-

structed the jury in a general way upon the question of due care of the plaintiff, and in substance had said to them, that if the plaintiff, although riding upon a bicycle, was using the degree of care which an ordinarily reasonable man would exercise under the circumstances including the degree of darkness, the rate of speed and the place where he was riding, then, so far as respected the question of due care, he was entitled to recover.

No exception was taken to this part of the charge, the only exception being to the refusal to give the request above named. Since this case was tried it has been decided by this court that a bicycle is not a carriage within the meaning of the term in Pub. Sta. c. 52, § 1. *Richardson v. Danvers*, 176 Mass. 413. The plaintiff was travelling upon a machine for whose use the town was not obliged to keep the road in repair under the last clause of that section. It is plain that a road might be entirely unsuitable for the use of the plaintiff while so travelling, and yet be reasonably safe for him on foot or in a carriage of the kind included within the terms of the statute. Whether and to what extent the reasonable use of travellers for which a road is to be kept in repair may call for consideration by the public authorities of persons riding on bicycles it is not now necessary to decide nor how far the fact that a traveller is riding upon a bicycle at the time of his injury may furnish ground for defence in an action of this kind. We have no doubt that the facts assumed in the defendant's request would have warranted a finding by the jury that the plaintiff was not in the exercise of due care, and that as an abstract proposition the request was correct.

But the refusal to give it affords no ground for an exception. The request seems only to single out certain circumstances and asks the court to rule upon their effect on the question of the due care of the plaintiff, apart from other circumstances bearing upon the same issue. By our well settled practice the court, especially at that stage of the trial, was not bound to do this.

Exceptions overruled.

DR. A. P. SAWYER MEDICINE COMPANY *vs.* CHARLES
E. JOHNSON & another.

Suffolk. November 12, 1900. — April 2, 1901.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

Goods were ordered by the defendant to be shipped "direct prepaid freight and await billing." The plaintiff shipped the goods by rail marked with the name and place of business of the defendant, to be delivered to the order of the consignee, prepaid the freight, and took from the railroad company a temporary receipt in his own name stating these facts and also stating that the receipt was to be exchanged for the company's bill of lading. No bill of lading was in fact issued. *Held*, that the plaintiff could maintain goods sold and delivered, the delivery to the carrier in accordance with the order being a delivery to the defendant, and the taking of the temporary receipt by the plaintiff being in no way a reservation of the *jus disponendi*.

CONTRACT to recover \$63 for goods sold and delivered according to the terms of a written order. Writ, in the Municipal Court where the action was brought, dated March 14, 1898.

In the Superior Court, to which the case came by appeal, at the trial before *Hopkins, J.*, the following facts appeared.

The order was as follows:

"Dr. A. P. Sawyer Med. Co., 161 Colorado avenue, Chicago. Salesman S. H. K. date sold Nov. 3, '97. . . . Please ship the following order through any jobber or direct, which we agree not to countermand. Date billed 11-10-97. . . .

"Terms 30 days. 1½ per cent discount in 10 days. . . . F. O. B. Chicago. 6 doz. Dr. Sawyer Pastilles, \$7.00. 6 doz. Dr. Sawyer Family Cure Tablets, 50 cts. size, \$3.50. Freight Paid. Duplicate. Total, \$63.00. Ship direct prepaid freight and await billing.

"There is no agreement aside from this order. All special promises are specified either on the face or back of this order. I have a correct and complete copy of this order and all the special promises or agreements are made upon the face or back of this order written in ink by your salesman. Chas. E. Johnson & Co."

The letters "F. O. B." and the word "Chicago" were a part of the printed matter of the order, in bold type, and underneath

them, on the face of the order, were written in ink the words "Freight Paid" and in lead pencil the words "Ship direct prepaid freight and await billing."

The plaintiff put in evidence the deposition of one of its salesmen, who testified that the order declared on was signed in his presence, and that the plaintiff did all that was required of it by the terms of said order. The plaintiff also put in evidence the deposition of the person who had charge of the shipping for the plaintiff, who said that the goods called for by the order were shipped at Chicago, November 10, 1897, and that the plaintiff paid the freight and took in its own name a railroad receipt. This receipt was as follows:

"Ex. Pd. Chicago, Nov. 10, 1897. Received of the Dr. A. P. Sawyer Medicine Co., in good order, by the Via Nickle Plate Line, the following goods as marked in the margin, to be delivered in like good order to consignee, without unnecessary delay. *Marks.* Chas. Johnson & Co., Dorchester, Mass. *Articles.* Printed matter. Paid. P. P. 115. J. J. Herrick, Cashier.

"The N. Y. C. & St. L. R. R. Co. Received Nov. 10, 1897. Taylor & Clark Sts. I. L. Lockwood, Agent.

"This is a temporary receipt, and is to be surrendered in exchange for the company's bill of lading of the form now in use, under the terms of which the shipment is made and the goods received by the carrier."

The plaintiff also called the defendant Johnson, who testified that he signed the order declared on, and, upon cross-examination, that he never received any notice from the plaintiff company, but did receive a notice from the Fitchburg Railroad Company of Boston, that certain goods from Chicago, addressed to him, were at the freight office in Boston. This was a second notice and was dated March 9, 1898, and directed him if he "claimed goods, to present bill of lading or prove ownership." That he had received from the railroad company a previous notice that the goods were at the freight office, but was unable to fix the date of its receipt. That on the 16th of November, 1897, he sent to the plaintiff a letter, which was duly received, of which the following is a copy: "Boston, November 16, 1897. The Dr. A. P. Sawyer Co.: Please counter-

mand order for Sawyer's Pastelles and Family Cure. Yours respectfully, C. E. Johnson & Co." Johnson further testified, that he never called at the railroad office for the goods referred to, or received them at his place of business. This was all the evidence offered by the plaintiff.

The defendants in their own behalf introduced the evidence of the defendant Johnson, who said that he never received from the plaintiff a bill of lading for the goods referred to in the order.

The defendants requested the judge to rule, that upon all the evidence the plaintiff was not entitled to recover, and that he was not entitled to recover for goods sold and delivered; also, that if the jury believed that the plaintiff took the receipt in its own name from the common carrier in Chicago, it was evidence that the plaintiff intended to exercise the right of ownership over the goods, and a delivery by the plaintiff to a carrier in Chicago was not a delivery to the defendants. The judge refused to rule as requested, and the defendants excepted.

The judge, among other instructions, instructed the jury that if the plaintiff complied with the terms of the order and delivered the goods, F. O. B. Chicago, to a common carrier in Chicago, and paid the freight, that an action would lie for goods sold and delivered. To this instruction the defendants excepted.

The jury found for the plaintiff; and the defendants alleged exceptions.

F. F. Sullivan, for the defendants.

R. D. Ware, for the plaintiff.

HAMMOND, J. This is an action for goods sold and delivered. The goods were sold on thirty days' credit, and the plaintiff was to ship them at Chicago, freight prepaid. The goods, duly marked with the name of the defendants and their place of business, were delivered on November 10, 1898, to a common carrier in Chicago, and a receipt therefor taken by the plaintiff in its own name. This receipt was merely temporary in its character, and recited that it was to be surrendered in exchange for the carrier's bill of lading "of the form now in use." This temporary receipt never was given up and no bill of lading ever

was sent by the plaintiff to the defendants. The evidence tended to show that the goods arrived in Boston in due time, that the defendants received a notice from the railroad company in Boston announcing that fact, and that afterwards they received a second notice. The defendants never called at the railroad office for the goods, nor did they ever receive them at their place of business.

The chief question in this case is whether there was such a delivery of these goods as the plaintiff must show in order to maintain an action for goods sold and delivered. It is not enough that the goods have been identified and set apart for the vendee so as to pass the title to him subject to the vendor's lien for the price, but it is necessary that the possession should have been given to the vendee in performance of the contract, so that he has not only the title but also the possession. This delivery may be made to an agent of the vendee, and the well established rule is that where such a delivery is made to a common carrier at the express request of the vendee, or where such a request may be implied by the previous dealings between the parties or by a well known custom or usage, it is *prima facie* a delivery to him. *Frank v. Hoey*, 128 Mass. 263, and cases cited. *Wigton v. Bowley*, 130 Mass. 252.

It is evident, however, that there may be a delivery of the goods to a common carrier where the seller intends to retain the control of the goods, and so it has been held that where the receipt or bill of lading is taken in his name, that fact, when not rebutted by evidence to the contrary, is decisive to show his intention to preserve the *jus disponendi*, and to prevent the property from passing to the vendee. Ames, J., in delivering the opinion in *First National Bank of Cairo v. Crocker*, 111 Mass. 163, on page 167. *Wait v. Baker*, 2 Exch. 1. Benj. Sales, (6th Am. ed.) § 399.

The defendants contend that this principle is applicable to this case. We think not. The order was to "Ship direct prepaid freight and await billing." The goods were duly marked with the name and place of business of the defendants. They were to be delivered to the order of the consignees. The receipt which the plaintiff took from the railroad was merely temporary in its character, and was doubtless taken in that way because the order was to await billing.

Under the instructions of the court the jury must have found that the plaintiff complied with the terms of the order and delivered the goods to the common carrier in accordance therewith. That was a sufficient delivery to the defendants, so far as respects the form of this action.

Exceptions overruled.

JEREMIAH MCCARTHY vs. ARTHUR TIMMINS.

Suffolk. November 16, 1900. — April 2, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER,
HAMMOND, & LORING, JJ.

A driver of a public carriage is not acting within the scope of his employment, who, when ordered to drive to the stable his day's work being done, turns out of his course and drives some distance in an opposite direction in order to visit a saloon to get a drink, and there leaves his horses unattended, and his employer is not liable to a traveller on the highway injured by reason of the horses running away on account of the driver thus leaving them.

TORT against a proprietor of public carriages for injuries caused by the alleged negligence of a driver of the defendant in leaving his horses unhitched and unattended while he was taking a drink in a saloon, in consequence of which the horses ran away and collided with the horse and wagon driven by the plaintiff. Writ dated November 12, 1898.

At the trial in the Superior Court, before *Lawton, J.*, it appeared, that the plaintiff was in the express and coal business; that on October 11, 1898, at about 6.45 P. M., he, with one Hurley, was driving a one-horse wagon in Boston on the right-hand side of Massachusetts Avenue, going in the direction of Boylston Street; that just before they reached the corner of Massachusetts Avenue and Boylston Street, two horses running away and attached to a carriage, without any driver or other person in charge of them, ran into the plaintiff's team and knocked the plaintiff off his seat and broke his leg; and that on the same day, before the accident, one Scott had been in charge of this carriage and horses. The defendant then ad-

mitted that the carriage and horses belonged to him on the day of the accident and for a long time before, and that Scott was in his employ on the day of the accident, and had been in his employ for some time as a driver of the horses and carriage. The negligence of which the plaintiff complained was the act of Scott. The defendant did not admit that the conduct of Scott was negligent, or, if it were, that the defendant was legally responsible for his negligent act.

The plaintiff then called one O'Neil, a bartender in the employ of one McTernan, whose saloon was on the day of the accident situated on the corner of Massachusetts Avenue and Dundee Street. O'Neil testified that on the day of the accident, some time between 6 and 7 P. M., Scott drove up with the carriage, stopped on Dundee Street opposite a door of the saloon, and came in and bought a glass of whisky and drank it, and remained in the saloon about three minutes.

Scott was called as a witness by the plaintiff. His testimony is described and the substance of it stated in the opinion of the court.

At the close of the plaintiff's evidence, the defendant contended that it disclosed nothing upon which the jury would be warranted in finding a verdict for the plaintiff, and moved that a verdict be directed for the defendant. Thereupon, after argument, the judge directed a verdict for the defendant. The verdict was returned as ordered; and the plaintiff alleged exceptions.

The case was argued at the bar in November, 1900, and afterwards was submitted on briefs to all the justices.

W. Burns, for the plaintiff.

N. Matthews, Jr., (*S. R. Spring* with him,) for the defendant.

HAMMOND, J. The only question argued by the defendant is whether under the circumstances he is answerable for the act of Scott in leaving the team unattended upon a public street. Upon this question it appeared that on the day of the accident Scott was and for a long time had been in the employ of the defendant as a driver of the hack and two horses constituting the team. Scott's business was to stand with the team near the corner of Dartmouth and Boylston Streets to solicit passengers for carriage. About six o'clock on the afternoon of the accident he was

told by one Casey, the starter in charge of the defendant's teams, to take the team to the defendant's stable in Allston, distant westerly about a mile and a half. The team was then standing on Dartmouth Street, about one hundred and sixty feet north of Boylston Street, facing northerly towards Commonwealth Avenue, and the shortest and most direct route to the stables was northerly on Dartmouth Street, then westerly on Commonwealth and Brighton Avenues. Instead of taking this route Scott turned the horses around, drove southerly on Dartmouth Street one hundred and sixty feet to Boylston Street, then westerly on this street about three thousand feet to Massachusetts Avenue, then southerly on this avenue seven hundred and fifty-eight feet to Dundee Street; and then he turned his horses in so as to face Dundee Street. Leaving the team there unattended, he entered the saloon where he purchased and drank some whiskey. The evidence tended to show that he was in the saloon only about three minutes, but while he was there the horses ran away and before they were stopped the team came into collision with the plaintiff's team which was on the right-hand side of Massachusetts Avenue going towards Boylston Street, and the plaintiff was injured.

Scott, called by the plaintiff, testified that when he turned the corner on Dartmouth Street and started down Boylston Street he was not expecting to do any business for his employer, but was going "to help myself." While he was going westerly on Boylston Street, which runs parallel with Commonwealth Avenue, he was going in the direction of the stables, but when on reaching Massachusetts Avenue instead of turning northerly on that avenue he turned southerly towards Dundee Street and the saloon, he was going directly away from the proper and usual route to the stables. The only witness who testified as to Scott's purpose in taking this route was Scott himself, whose testimony in substance was that his purpose was to get a drink.

The well established rule as to the extent of the liability of the master for the act of his servant, so far as material to this case, is that if the act is done without the authority of the master and not for the purpose of executing his orders or doing his work, then he is not responsible, but if it is done in the execution of the authority given by the master and for the purpose of per-

forming what he has directed, then he is responsible, whether the act be negligent or wilful.

The only trouble is in the application of the rule, and it is not easy to reconcile the cases. Scott had been employed to drive the team in the carriage of passengers, and that work was ended for the day. He was then directed to go to the stables, and there can be no doubt that so long as he drove the team with that end in view, and for that purpose and for no purpose of his own, he was engaged in his master's business, even if he made a detour contrary to the direction of his master. We are not disposed to lay much stress on the fact that he went down Boylston Street rather than Commonwealth Avenue, but when he reached Massachusetts Avenue it is plain that his only purpose in turning southward instead of northward, and going seven hundred and fifty-eight feet to Dundee Street, was not only to deviate from the regular way of reaching the stable but was for a purpose of his own, namely, to get a drink. He was upon no errand of his master, and this journey was not for the purpose of getting to the stables even by a circuitous route, or, to use the language of Hoar, J. in *Howe v. Newmarch*, 12 Allen, 49, 57, he was doing an act wholly for a purpose of his own, disregarding the object for which he was employed and not intending by his act to execute it, and not within the scope of his employment. In such case the defendant should not be held answerable.

Whatever may be the view entertained elsewhere as to the application of the principle to facts like these, (see *Ritchie v. Waller*, 63 Conn. 155,) we do not feel it necessary to review the numerous cases in our State and elsewhere bearing upon the question. Reference, however, may be made to the following cases as illustrative of the rule. *Howe v. Newmarch*, *ubi supra*. *Wallace v. Merrimack River Navigation & Express Co.* 134 Mass. 95. *Walton v. New York Central Sleeping Car Co.* 139 Mass. 556. *Bowler v. O'Connell*, 162 Mass. 319. *Storey v. Ashton*, L. R. 4 Q. B. 476. *Rayner v. Mitchell*, 2 C. P. D. 357. See also *Perlstein v. American Express Co.* 177 Mass. 530.

It is contended, however, by the plaintiff that the intent of Scott in turning south when he reached Massachusetts Avenue and going to the saloon on Dundee Street is a question of fact,

and that the jury might have disbelieved him ; and they point to the fact that Scott originally told a different story, and told this one only after he had had a conversation with the defendant. It is to be noted, however, that Scott was called by the plaintiff, that his earlier stories in no way concerned his motives for going to the saloon, and that the whole theory of the plaintiff's case seemed at the trial to be that Scott went into the saloon. The ruling of the court was made at the close of the plaintiff's evidence. There did not appear any conflict of evidence, and we think the question of the veracity of Scott cannot be raised now before us. In the opinion of a majority of the court the exceptions must be overruled.

Exceptions overruled.

CHARLES E. DAVENPORT & another vs. INHABITANTS
OF DEDHAM.

Norfolk. November 20, 1900. — April 2, 1901.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

Under St. 1896, c. 257, requiring the alteration of certain grade crossings in Hyde Park and Dedham, a petitioner cannot recover damages due to the fact that a change of grade has made passage over the street to and from his estate less convenient than it was before, although his ownership and occupation of land on the street make it necessary for him to use the street more frequently than the general public, since such damage does not differ in kind, although it may in degree, from the damage sustained by that portion of the public generally who may have occasion to use the street.

Where no land is taken, neither St. 1890, c. 428, to promote the abolition of grade crossings, nor Pub. Sts. c. 49, §§ 18, 68, 69, in regard to damages from the laying out, alteration or discontinuance of highways, provides for the payment of any damages not special and peculiar.

PETITION under St. 1896, c. 257, requiring certain alterations in grade crossings at Hyde Park and Dedham, to recover for damage to certain real estate on MacDonald Street, lying mostly in the town of Dedham, the respondent, the alleged damage having been sustained by the raising of the grade of a portion of Sprague Street, in Hyde Park, as provided by a decree of the Superior Court, dated May 7, 1897, confirming a report of a

special commission appointed to determine the manner of separation of the grades of the New York, New Haven and Hartford Railroad, the New England Railroad, and certain ways crossing those railroads, filed May 19, 1898.

At the trial in the Superior Court, before *Gaskill*, J., the petitioners put in evidence the report of an auditor to whom the case had been referred, and stated to the court that while they did not rely upon the auditor's report, yet the auditor's findings of fact, in relation to everything except damage, were correct.

The petitioners, in addition to the auditor's report, introduced the evidence of Charles E. Davenport, one of the petitioners. He testified that the petitioners carried on an ice business at Dedham and Hyde Park, and that their ice houses were on MacDonald Street on the south side of Sprague Pond about twelve hundred feet by the road from the beginning of the change of grade in Sprague Street. He also pointed out on the plan used at the trial another piece of land owned and occupied by the petitioners. He was then asked: "What effect, if any, did this change of grade in Sprague Street have upon the value of the last mentioned piece of land?" The question was objected to and excluded. The petitioners' counsel stated that the evidence was offered to show damage to the land and loss of the petitioners' business, and that "The evidence would be cumulative as to the damage to both pieces of property."

At the conclusion of Davenport's testimony, the judge, at the request of the respondent, ruled that the petitioners could not recover, and ordered a verdict for the respondent. To this ruling and order, and to the exclusion of the evidence offered as above set forth, the petitioners alleged exceptions.

The only question raised by the record was in regard to the correctness of the rule of law as to damages stated by the auditor in his report and approved by the judge. The auditor's statement of the rule is given in full in the opinion of the court.

W. H. Powers, for the petitioners.

J. H. Benton, Jr., for the respondent.

HAMMOND, J. The auditor found as a fact that "the petitioners have sustained no damage by reason of said decree or by the change in grade of said street prescribed thereby, unless it

be such damage as is due to the fact that the change of grade above referred to has made passage over said street to and from their said estate less convenient than it was before; that if the petitioners have sustained any damage by reason of the fact that their ownership and occupation of land on said street make it necessary for them to use the street more frequently than the general public, and by reason of the fact that the street is less convenient for use than it was before, such damage does not differ in kind, although it may differ in degree, from the damage which has been sustained by that portion of the public generally who may have occasion to use said street"; and ruled that for damages of this character the petitioners were not entitled to recover, and found for the respondent.

At the trial in the Superior Court the auditor's report was put in, and Davenport, one of the petitioners, having taken the stand as a witness, was asked by his counsel, what effect, if any, the change of grade in Sprague Street had upon the value of his land. This question was excluded, and the petitioners' excepted. It does not appear that the petitioners desired to show any other element of damage than those stated in the findings of the auditor. If, therefore, the rule of law stated by the auditor is correct, the petitioners were not harmed by the exclusion of the question.

We are of opinion that the rule is as stated by the auditor, and that therefore the ruling of the court that the petitioners are not entitled to recover was correct. Where no land is taken neither St. 1890, c. 428, nor Pub. Sts. c. 49, §§ 16, 18, 68, 69, can be held to include such damages as are not special and peculiar. The reasons for this are so elaborately set forth in *Proprietors of Locks & Canals v. Nashua & Lowell Railroad*, 10 Cush. 385, that it suffices to refer simply to that case. In *Dana v. Boston*, 170 Mass. 593, upon which the petitioners rely, it appears from an examination of the papers in the case that the damages claimed were of a nature special and peculiar, and the decision was that in such a case it was not necessary in a petition brought under Pub. Sts. c. 49, §§ 68, 69, that the land damaged should abut on the highway.

In view of this conclusion upon the question of damages, it became unnecessary to pass upon the other ground of defence.

Exceptions overruled.

CHARLES' E. DAVENPORT & another vs. INHABITANTS
OF HYDE PARK.

Norfolk. November 20, 1900. — April 2, 1901.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

A petitioner seeking to recover damages alleged to have been suffered by him from a change of grade in a street made under St. 1896, c. 257, requiring the alteration of certain grade crossings in Hyde Park and Dedham, cannot testify what effect, if any, the change of grade had upon the view from his house, if his land was too far away to make it a practical question. Nor can he claim damages on the ground that the change of grade made it impossible to haul as heavy loads over the street as before, such damage not being special and peculiar. The petitioner could have described the amount of the increased flow of surface water upon his land and the damage if any caused thereby, in case such increased flow of water had existed.

PETITION precisely similar to that in the preceding case of *Davenport v. Dedham*, except that the respondent herein was the town of Hyde Park, filed May 19, 1898.

In the Superior Court the case was referred to the same auditor and tried before the same judge as *Davenport v. Dedham*. The judge ordered a verdict for the respondent; and the petitioners alleged exceptions. The questions raised by the exceptions are stated in the opinion of the court.

W. H. Powers, for the petitioners.

J. H. Benton, Jr., for the respondent.

HAMMOND, J. The auditor found substantially as in the case of *Davenport v. Dedham*, ante, 382, that the damage sustained by the alteration of the grade of the street did not differ in kind though it may differ in degree from the damage sustained by the public generally who may have occasion to use the street, and ruled that for such damage the petitioners could not recover, and found for the respondent. See *Davenport v. Dedham*, ubi supra.

At the trial in the Superior Court the petitioners put in the auditor's report, and Charles E. Davenport, one of the petitioners, took the stand as a witness. He was asked what effect, if any, the change of grade had upon the view from his house. We think the question was properly excluded. Manifestly the land

was too far away to make that a practical question. He was then asked whether the alteration in the grade caused any surface water to flow upon his land, and after answering "Not in that way," he finally said "Yes." He was not asked to state to what extent, if any, he was damaged or interrupted in his business, and it is obvious that the real claim of the petitioners was not for a damage by some possible flow of water upon his land one hundred and thirty feet from where the change of grade began, but was the claim made before the auditor that the change of grade rendered it impossible to haul as heavy loads over it as before. This is shown by the whole course of the examination. The estimates given by the witness of the depreciation of the value of the land all manifestly include this element of damage, and therefore throw no light upon the real question before the jury. The petitioners could have described the amount of the increased flow of surface water upon their land, and the damage, if any, caused by the flow, but no attempt of the kind was made, and we do not think that the evidence introduced was definite enough to control the finding of the auditor.

Exceptions overruled.

NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY & another *vs.* JAMES E. BLACKER & another.

JAMES E. BLACKER & another *vs.* NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY & another.

SAME *vs.* INHABITANTS OF DEDHAM.

Norfolk. November 23, 1900. — April 2, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER, HAMMOND, & LORING, JJ.

Under St. 1890, c. 428, § 5, amended by St. 1891, c. 128, to promote the abolition of grade crossings, in assessing the damages sustained by a petitioner in the remaining portion of a coal and lumber yard, a part of which had been taken under the act, such yard having upon it at the time of the taking spur tracks connected with the railroad, a ruling is right, that regard should be had to the premises as they were on the date of the decree changing the grade of the crossing, taking

into consideration, as affecting the market value of the property, the railroad facilities as they then existed, but with the possibility of the discontinuance of the spur tracks by the railroad company.

Under St. 1890, c. 428, § 5, amended by St. 1891, c. 123, to promote the abolition of grade crossings, consequential damages cannot be recovered. This construction is enforced by the language of the act "All damages sustained by any person in his property," but the principle is a general one not dependent on the exact phraseology. In this case, the damages excluded as consequential were the cost of moving the contents of a building cut off by the taking, waste in handling coal which had to be moved and loss from necessary interruption to business.

PETITIONS under St. 1890, c. 428, as amended by St. 1891, c. 123, for the assessment of damages caused by the abolition of a grade crossing of the New York, New Haven and Hartford Railroad over Mount Vernon Street in Dedham, filed in the first case November 17, 1897, and in the last two cases May 6, 1898.

The cases were heard in the Superior Court by *Fessenden, J.*, without a jury, who at the request of the parties reported them for the consideration of this court, such judgment to be entered as law and justice might require.

The report was as follows: "I found the facts to be:

"FIRST: . . . The land had been prepared for a coal and lumber yard, and suitable buildings for that purpose erected thereon, and it has been used for that purpose for about twenty-six years. Mt. Vernon Street ran through this yard and crossed the railroad at grade. The yard extended along the track of the railroad about eight hundred feet and had been blasted out and dug down by the owners so as to be practically at grade with the railroad for the whole length. Two spur tracks had been laid from the railroad into this yard, and at the time of the taking were used and for about fourteen years had been used in conveying lumber and coal into the yard. There was no evidence of any agreement between the owners of the land and the Railroad Company that these tracks should remain or that it would deliver freight over them in the yard, and the owners did not claim any such agreement, but the Railroad Company had delivered lumber and coal over them, in some years as many as two hundred ninety cars. Several hundred cars between 1892 and 1898 were also delivered upon these tracks for parties other than the petitioners, but this was always at the request of the consignee and with the consent of the petitioners. In some of the freight tariffs, for several years, the Railroad Company advertised the siding from which these spur tracks ran as a private

siding under the name of Stone Haven, which was the name of the passenger station directly opposite the petitioners' premises. But the Railroad Company never advertised this as a siding for public delivery, nor did it ever make public deliveries from this siding or these spur tracks. The siding was also used for storing cars by the Railroad Company to some extent.

"SECOND: On the seventh day of May, 1897, by a decree of the Superior Court confirming the report of Commissioners appointed to prescribe the manner in which grade crossings of the railroad should be abolished, Mount Vernon Street was required to be raised and carried over the railroad at a height of seventeen feet above the tracks, and a strip of land belonging to the petitioners adjacent to the railroad location sixteen feet wide, and containing eleven thousand one hundred seventy-nine square feet was taken, and the grade of the railroad upon the old location and on the strip thus taken was lowered about six feet throughout the length of the yard. The taking and change of grade of Mount Vernon Street rendered it impossible to maintain the spur tracks from the railroad into the petitioners' yard and impracticable to construct any new spur tracks from the railroad into the petitioners' yard. There was no evidence that the discontinuance of these spur tracks was contemplated by the Railroad Company except as required by the execution of said decree. . . .

"THIRD: The Railroad Company was required by the law under which the decree was made to take the alterations prescribed by the report and decree of the Court, and in the spring of 1898 it entered upon the land taken and upon Mount Vernon Street and lowered the railroad and raised the street as required by the decree. This required some of the buildings containing coal and lumber on the land of the petitioners to be cut off, and made it necessary for the petitioners to move the contents.

"The coal moved amounted to 978 tons and the cost of moving the same was \$120, or 12 1-4 cents per ton, and the waste caused by handling the same was \$440; or 45 cents per ton. It appeared that 329 tons of coal were in the coal shed at the time of the taking and that the balance of 649 tons had been ordered prior to the taking but was placed in the shed between the time of the taking and the entry on the land by the Railroad Company.

The alterations also made it necessary for the petitioners to move lumber from one place to another as above, at an expense of \$1,235. The petitioners' business in the yard was disturbed and interrupted by the alterations and the damage caused by this amounted to \$750. The fair market value of the 11,179 square feet of the petitioners' land taken by the decree, including that portion of the buildings thereon, was \$3,912.65.

"The petitioners contended that in assessing the damages to the remaining land caused by the taking and by the change of grade of Mount Vernon Street, I should regard the premises as they were situated on May 7, 1897, taking into consideration as affecting their market value the railroad facilities as they then existed, but with the possibility of the discontinuance of the spur tracks by the railroad.

"I ruled *pro forma* in favor of the petitioners' contention against the respondent's objection and find that the damages for the injury to the remaining land are \$14,882.61. If, however, the possibility of having spur tracks was not to be considered, then I find the damages for the injury to the remaining land are \$10,417.61.

"I also ruled *pro forma* that the petitioners were not entitled to recover for the cost of removing the contents of the building nor for the waste caused by handling the coal moved.

"I also ruled *pro forma* that the petitioners were not entitled to recover for the cost of moving lumber from one place to another in the yard, nor for the disturbance and interruption of their business by the alterations.

"The respondent excepted to the first ruling. The petitioners excepted to the second and third rulings.

"I assessed the total damages of the petitioners at \$18,795.26. . . ."

The case was argued at the bar in November, 1900, and afterwards was submitted on briefs to all the justices.

C. R. Clapp, (H. N. Glover, Jr. with him,) for the petitioners.
J. H. Benton, Jr., for the railroad company.

LORING, J. 1. The respondent's exception to the ruling in favor of the petitioners' contention is not well taken. Their contention was that, in assessing the damages to the petitioners' remaining land, regard should be had to the premises as they

were situated on May 7, 1897, the date of the decree confirming the report of the commissioners changing the grade of the crossing in question, and "taking into consideration as affecting their market value the railroad facilities as they then existed, but with the possibility of the discontinuance of the spur tracks by the railroad."

This ruling is in accord with well settled principles. *Maynard v. Northampton*, 157 Mass. 218. The fact that this land was situated on the line of the railroad and at a level with it, so that spur tracks could be (as they were) built running on to it, made it valuable for any business which could be economically carried on by having freight delivered to it directly from the cars without the expense of handling and carting. That was an element which in fact gave, or might have given, value to this land, and which could properly be considered in determining what the fair market value of it was. If the respondent were right in its contention that this fact could not be considered because the petitioners had no legal right to have the spur tracks continue, the fact that a lot of land is in the business portion of a city or town in place of in the residential or other less valuable portion of it, could not be taken into consideration in determining its market value; the owner of a lot of land in the business centre of a city has no legal right to have the business of the city done in that neighborhood; but the fact that it is done there, and is likely to continue to be done there, is a fact which affects the market value of the land. Instances, where circumstances, which exist, but which the owner has no legal right to have continue to exist, have been taken into account in determining the market value of land, are common. *Shattuck v. Stoneham Branch Railroad*, 6 Allen, 115. *Eastern Railroad v. Boston & Maine Railroad*, 111 Mass. 125. *Marsden v. Cambridge*, 114 Mass. 490, 492. *Williams v. Taunton*, 125 Mass. 34, 41. *Drury v. Midland Railroad*, 127 Mass. 571. *Moulton v. Newburyport Water Co.* 137 Mass. 163. *Providence & Worcester Railroad v. Worcester*, 155 Mass. 35, 42. *Fales v. Easthampton*, 162 Mass. 422.

The value given to the land by its being next to the railroad and on a level with it was not affected by the passage of the grade crossing act, St. 1890 c. 428, which rendered it probable that the grade would be changed by the exercise of the power of

eminent domain, *Benton v. Brookline*, 151 Mass. 250, nor is it material that under the statute the respondent railroad, which could have removed the spur tracks without making compensation to the petitioners had it desired to do so for business purposes, has to pay sixty-five per cent of the damages of the changes of grade. It was found by the court that "There was no evidence that the discontinuance of these spur tracks was contemplated by the railroad company except as required by the execution of said decree" for changing the grade of this crossing. The change which has been made was not made by the railroad for its own purposes, but was ordered by the public authorities for the convenience and safety of the public. The fact that the Legislature has in its discretion apportioned part of the expense of making this public improvement on the railroad is an accident which is of no consequence in this connection.

2. The exceptions taken by the petitioners were not well taken. They excepted to the rulings that they were not entitled to recover (1) the cost of moving the contents of the building which was cut off by the taking, or (2) the damages which they sustained from waste in handling the coal which had to be moved, or (3) the damages caused by the necessary interruption of their business.

On the findings entered in the report we take it to be the fact that the petitioners did suffer these damages, and it must be admitted that such damages are damages which have been suffered by the petitioners from the fact that the land and buildings taken were taken. Whether these damages can be recovered or not depends upon this: Are the damages which can be recovered limited to the land taken or injured by the taking on the one hand, or on the other hand do they extend to and include all consequential damages suffered from the taking? In the case of *Patterson v. Boston*, 23 Pick. 425, where the front of the plaintiff's store was cut off by widening a street, Chief Justice Shaw instructed the jury that the plaintiff was entitled not only to the expense of moving the goods in the store to a place of safety while a new front was being put up, and of moving them back when the new front of the store was finished, but also to the loss of profits or to the rent of another store while the work was going on. In this court the plaintiff's right to the expense of moving the goods and

of bringing them back was admitted, and the loss of profits or the expense of the rent of the other store was contested; it was held that the plaintiff was entitled to either the loss of profits or the rent of another store, according as one or the other was the best method of conducting the business; and in *Brooks v. Boston*, 19 Pick. 174, 177, a case where a street was widened on its southerly side, it was said that it might be that the owner of a store on the northerly side could recover damages for the loss in his business if he could connect it with the interruptions caused by the widening of the street. These cases were cited with approval in *Penny v. Commonwealth*, 173 Mass. 507; but that case was a case of injury to property as distinguished from consequential damages sustained from property being taken; and so was the case of *Dodge v. County Commissioners*, 3 Met. 380, also relied on by the petitioners. *Brooks v. Boston* cannot now be regarded as authority (see *Rand v. Boston*, 164 Mass. 354) and the later cases have established the rule that consequential damages are not within such statutes. In *Edmands v. Boston*, 108 Mass. 535, it was held that the cost of moving away goods which were in a store when a portion of it was taken in widening a street, to a place of safety while the necessary repairs were being made, and the cost of bringing them back, could not be recovered; and that the lessee of the store could not recover damages for loss of good will of his business. See p. 549. And in *Williams v. Commonwealth*, 168 Mass. 364, it was held that a life tenant who had been at certain expense in making the premises taken adapted to his business of a dentist, but which it was admitted did not increase the market value of the premises, could not recover for the damages so suffered by him, and on the ground that they "cannot be regarded as an element of damage, any more than the loss of good will would be." The same general rule is recognized in *Maynard v. Northampton*, 157 Mass. 218, 219, and in *Butchers' Slaughtering & Melting Association v. Commonwealth*, 169 Mass. 103, 118, 119.

We have not referred to the particular wording of the statute in question, St. 1890, c. 428, § 5, amended by St. 1891, c. 123, although it bears out this conclusion by the use of the phrase "all damages sustained by any person in his property by the taking of land"; that this clause of the section and not the

clause at the end of it is decisive of its construction see *Rand v. Boston*, 164 Mass. 354. The question is a general question of construction, and though the result reached is enforced by the phraseology of this act, the same result has been reached in the cases cited above dealing with statutes where the phraseology is somewhat different.

Exceptions overruled.

ANNA C. SNOW vs. CHARLES W. DYER.

Barnstable. December 6, 1900. — April 2, 1901.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

Under St. 1893, c. 396, § 25, a district court has no power to extend the time of twenty-four hours allowed by § 24 for taking an appeal to the Superior Court. It has power to extend the time for filing the bond required to perfect the appeal, but not beyond the next return day of the Superior Court. *Semle*, however, that when the party against whom a decision is to be made expresses an intention to appeal and a desire to have the time for filing the bond extended beyond the next return day, it is within the power of the district court in its discretion to postpone the formal entry of the judgment to a reasonable time, even to a time beyond the next return day, so that the proposed appellant then may be prepared to file his bond.

The provision of St. 1893, c. 396, § 25, permitting an extension of the time for filing the bond required on an appeal from a district court to the Superior Court, expressly excepts actions for forcible entry and detainer under Pub. Sts. c. 175, and in order to perfect an appeal in such an action the bond must be filed within the twenty-four hours allowed for taking the appeal.

Where an appeal from a district court to the Superior Court is not perfected by the filing of a bond within the required time, the Superior Court cannot affirm the judgment of the district court appealed from, having no jurisdiction because no appeal has been taken. Its jurisdiction is confined to cases where an appeal having been taken lawfully, the appellant fails to enter and prosecute it. But where no bond is filed in time, the judgment of the district court is not vacated, and application should be made to the Superior Court to dismiss the appeal for want of jurisdiction.

HAMMOND, J. This is an action of forcible entry and detainer under Pub. Sts. c. 175, brought in the Second District Court of Barnstable. There was a hearing before the court September 14, 1899, and the case was continued until the 29th of the same month, at which time judgment was entered for the plaintiff. On the same day the court passed an order extending

the time for appeal to October 10, 1899, on which day the appeal bond was filed; and the record continues as follows: "And it was considered by the Court that the said plaintiff recover against the said defendant the sum of thirty-one dollars and seventy-four cents, costs of suit, from which said judgment the said defendant appealed to the Superior Court, next to be holden at Barnstable within and for the County of Barnstable, on the first Monday of November next, and filed a bond with sufficient sureties, in the sum of one hundred and fifty dollars to prosecute his said appeal." A strict interpretation of the record might seem to lead to the conclusion that there were two judgments, one of September 29, for possession, and one of October 10, for costs; and that the appeal to the November sitting of the Superior Court was simply from the judgment as to costs. The appeal bond filed in court, however, recites that on September 29 the plaintiff recovered judgment for possession of the premises described in the writ, and also for \$31.74 costs of suit. It is treated as one judgment, as it ought to have been. The bond further recites that the appeal from this judgment is to the November sitting of the Superior Court, "the time for appeal having been extended to Oct. 10th, 1899." We therefore regard the record as showing in substance one judgment, namely, that of September 29, the entry of October 10 as to costs being an extension simply of a part of the judgment of September 29; and the parties have argued the case upon that view.

On the first Monday of November, the defendant filed in the appellate court the proper papers, and on the same day the plaintiff filed there a complaint for affirmation of the judgment of the District Court upon the ground that the appellant had failed to enter and prosecute the appeal according to law. The case was continued until October 11, 1900, on which day the defendant filed a paper resisting the motion of the plaintiff for affirmance on the ground that the time for appeal had been extended by the consent of the counsel for the plaintiff. The court on that day granted the motion for affirmance and the defendant appealed. On November 5, 1900, judgment was entered for the plaintiff for possession and costs, and the defendant again appealed. The case is before us on these last two appeals.

The first question is whether the District Court could extend the time for appeal. It is plain that it could not. The time for appeal is fixed by the statute. Even where the time for filing the bond may be extended, the appeal must be taken "within twenty-four hours after the entry of judgment," and it must be to the Superior Court "then next to be held in the county," (St. 1893, c. 396, § 24; *McIniffe v. Wheelock*, 1 Gray, 600,) by which phrase is now meant the court held on the return day next after the expiration of the said twenty-four hours. St. 1885, c. 384, § 5. It is contended, however, by the defendant, that, if the provisions of the statutes authorizing the extension of the time for filing a bond in the case of an appeal from a district court apply to any action of forcible entry and detainer, the appeal is not taken until the bond is filed; that the power to extend the time for filing the bond necessarily implies the power to extend the time for taking the appeal; and that, when the time for filing the bond is extended beyond the return day next after the expiration of twenty-four hours from the judgment, the appeal must be considered as taken to the court to be held on the return day next after the time of filing the bond. It is further contended by the defendant that if the above named statutes as to the time of filing the appeal bond do not apply, and it is held that such an appeal is regulated by the provisions of the sixth section of Pub. Sts. c. 175, then, inasmuch as no time is specified in that section within which the bond is to be filed, the time may be extended to any reasonable extent. Neither position is tenable.

If the Legislature had intended to give to the District Court the power to extend the time of appeal, it would have been likely to express such an intention in direct and plain language, especially when it was dealing with the subject of appeals in the very section immediately preceding. See St. 1893, c. 396, §§ 24, 25. Moreover, when an appeal is taken, the clerk must transmit the papers to the appellate court, so that they may be there on the proper return day. The reasonable construction of the provision for extending the time is that the time shall not be extended beyond the return day next after the expiration of the twenty-four hours after judgment. That makes all the provisions respecting the time of taking the appeal, the court to

which the appeal is taken, the filing of the bond, and the entry day of the appeal consistent with each other and with the plain language of the statute. It sometimes happens that, after the court has announced the decision to which it has come, the party against whom the decision is to be made expresses an intention to appeal and a desire to have the time for filing the bond extended beyond the next return day. In such a case it is within the power of the court at its discretion to postpone the formal entry of the judgment to a reasonable time, even to a time beyond the next return day, so that the proposed appellant may be then prepared to file his bond. We have no doubt that in the exercise of a fair discretion this is frequently done, and to this course we see no legal objection.

We have thus far considered the case as if the provisions of the statutes authorizing an extension of the time for entering into a recognizance, or filing a bond, were applicable to the action of forcible entry and detainer. But it is plain that they are not applicable. They expressly exclude from their operation such actions. St. 1877, c. 236, § 1. Pub. Sts. c. 155, § 29; c. 154, § 39. St. 1893, c. 396, § 25. For many years it has been the policy of the Legislature to discourage appeals by the defendant in such an action, and such an appellant has been required to enter into a recognizance (since St. 1888, c. 325, to file a bond,) not only to pay the costs, but also to pay the rent due and to become due; St. 1825, c. 89, § 2; Rev. Sts. c. 104, § 10; and also the damage and loss sustained by the plaintiff by reason of the withholding of the demanded premises and by reason of any injury done thereto during the time of such withholding. St. 1848, c. 142. Gen. Sts. c. 137, § 9. Pub. Sts. c. 175, § 6. The reasons for such a policy are set forth in *Davis v. Alden*, 2 Gray, 309, and the exclusion of such an action from the operation of the statutes providing for the extension of the time of filing a bond is in accordance with it. In this class of actions, therefore, the law remains as before. The appeal must be taken within twenty-four hours and must be perfected within that time by the filing of a bond. Pub. Sts. c. 154, § 39; c. 155, §§ 28, 29.

In this case the appeal was not taken within twenty-four hours, and therefore there was no appeal; and the judgment of

the District Court was not vacated, but remained in full force. *Campbell v. Howard*, 5 Mass. 376. *Rice v. Nickerson*, 4 Allen, 66. Nor is there anything in the letter from the plaintiff's counsel to the defendant's counsel, dated September 18, 1899, which could be taken to be a consent that the court should extend the time for taking an appeal. It speaks only of the extension of time for filing the bond.

Under these circumstances the Superior Court had no power to affirm the judgment of the lower court. That power is confined to cases where, an appeal having been lawfully taken, the appellant fails to enter and prosecute his appeal. St. 1893, c. 396, § 30. In such a case, the judgment of the lower court having been vacated, the appellee may have it affirmed by the appellate court. The remedy of the appellee here was to move in the Superior Court that the appeal be dismissed upon the ground that it had not been legally taken, and that the court had no jurisdiction. If such a motion had been made, it doubtless would have been granted. But the court had no power to affirm the judgment of the District Court. The result is that the judgment of the Superior Court must be reversed. As the appeal was not legally taken and that court has no jurisdiction over the case, it is not too late to move there that the appeal from the District Court be dismissed.

Judgment affirming judgment of District Court reversed.

W. O. Childs, for the defendant.

C. B. Snow, Jr., for the plaintiff.

ELIZA DEAN vs. HANNAH V. ROSS.

Plymouth. January 8, 9, 1901. — April 2, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

In an action for a conversion, the omission from the declaration of an allegation of the plaintiff's possession cannot be taken advantage of after verdict for the plaintiff on a motion for arrest of judgment, as the objection does not affect the jurisdiction of the court as required by Pub. Sts. c. 167, § 82. Moreover, in this case, there was evidence that the property converted belonged to the plaintiff, and the judge in his charge assumed this fact without objection from the defendant.

In an action for the conversion of bonds, there was evidence, that the defendant falsely represented to the plaintiff that the spirit of the plaintiff's deceased husband spoke to her through the defendant as a medium, telling her to give the bonds to the defendant; that the plaintiff believed the representation and relying on it gave the bonds to the defendant; and that the deception was successfully kept up until a year before the action was brought, although some of the bonds had been delivered more than six years before the date of the writ. *Held*, that this evidence would warrant a jury in finding that there was a fraudulent concealment of the cause of action under Pub. Sta. c. 197, § 14, and that the plaintiff could bring her action at any time within six years after she discovered that she had been duped. A defendant, who has fraudulently brought the plaintiff under such a delusion, cannot set up that the plaintiff had means of ascertaining the truth.

In an action for the conversion of fifteen bonds of a certain company, evidence that the plaintiff paid par for three of the bonds and that the other twelve were of the same issue is sufficient to warrant the jury in finding that all of the bonds were worth par.

In an action for the conversion of bonds found by the jury to have been obtained from the plaintiff by fraudulent representations of the defendant that the spirit of the plaintiff's deceased husband through the defendant as a medium directed the plaintiff to deliver the bonds to the defendant, the defendant cannot take the ground, that the deception was so obvious that the plaintiff, who found it out after many years, ought to have found it out before and therefore cannot rely on having been deceived by it.

TORT for the alleged conversion by the defendant of fifteen bonds for \$500 each of the United States Electric Lighting Company at various times from June, 1891, to September, 1893. Writ dated August 26, 1897.

The answer contained a general denial and pleaded the statute of limitations.

At the trial in the Superior Court, before *Bond, J.*, it appeared by the plaintiff's evidence that she delivered the bonds to the defendant from time to time under what purported to be directions from the spirit of her deceased husband speaking through the defendant as a medium. The facts are sufficiently stated in the opinion of the court.

At the close of all the evidence, the defendant asked the presiding judge for certain rulings and instructions to the jury, including the following:

1. Upon all the evidence under the pleadings in this case the plaintiff cannot recover.

6. Upon all the evidence any claim for right to recover is barred by the statute of limitations as to conversions before August 27, 1891.

8. If the jury find that any bond or bonds were delivered to the defendant by the plaintiff and the plaintiff was induced by the defendant to make such delivery by representation or statement that she, the defendant, had received from the spirit of the deceased husband of the plaintiff, a message or messages directing, commanding, or advising such delivery, and that such representation or statement was the sole inducement to such delivery, the plaintiff cannot recover.

9. If the representation or statement so made was such representation and statement as would not be believed by any person of ordinary intelligence and understanding, the plaintiff cannot recover.

The judge refused to give the rulings numbered 1 and 6; and as to the rulings numbered 8 and 9, instructed the jury as follows:

"If there was a message received from the husband, and the defendant simply delivered the message, believing it to be true, to this plaintiff, why then that would not be any false statement with reference to the transaction; that would be a true statement, and I meant you to understand that then the plaintiff could not recover, if that was a fact and that was a real communication. What I meant to have you understand was, that if there was no communication, if the papers which were written purporting to contain messages from the husband were no messages from the husband, but were papers prepared by the defendant, pretending to be messages from the husband, then they were really communications of the defendant to the plaintiff for that purpose of deception and fraud. If there was a real message, and that was communicated, and that took the property, then the plaintiff is not entitled to recover."

After consultation with the defendant's counsel, the judge added:

"I understand now the position of the defendant to be this: that if there was this message, and it pretended to be a message on the part of the defendant from the plaintiff's husband, if there was really no such message, and if that was made up by the defendant, and communicated to the plaintiff, and the plaintiff did not rely upon it, did not believe it, ought to have known that there was no such message, why then the money, as I have

already said to you, was not obtained on the part of the defendant through the plaintiff relying on the false statement that was made. I meant to have you understand all the way through that there must not only be a statement, which must be false, which must be known to be false by the party who makes it, which must be made with the intention of deceiving, but that the party to whom it was made must deliver the property relying on the truth of the statement; and, of course, if the plaintiff knew there was no such message, and knew there could not be such a message, and was not deceived by it, and yet delivered over the property not relying upon the truth of the statement as to the message, she is not entitled to recover. You must find that the plaintiff believed that this was a message, communicated to her, from her deceased husband. If she relied upon that, and relying upon it, turned over the property, then she may recover, provided all the other elements in the case are made out as I have stated."

The jury returned a verdict for the plaintiff in a lump sum for the value of all the bonds alleged to have been converted, with interest from the time of their conversion; and the defendant alleged exceptions, which are stated in the opinion of the court.

Asa P. French, for the defendant.

R. W. Gloag, for the plaintiff.

LORING, J. 1. The defendant's first contention is that she is entitled to have judgment arrested because it is not alleged in the declaration that the plaintiff owned or was in possession of the bonds which it is alleged that the defendant converted to her own use. But such an objection is taken too late; it does not go to the jurisdiction of the court. *Commonwealth v. Mackay*, 177 Mass. 345. The case of *Carlisle v. Weston*, 1 Met. 26, relied on by the defendant, was decided before it was provided by statute that no motion in arrest of judgment should be allowed unless it is for a cause which affects the jurisdiction of the court. St. 1852, c. 312, § 22. Gen. Sts. c. 129, § 79. Pub. Sts. c. 167, § 82. Moreover in this case the fact appeared in evidence, which did not appear in *Carlisle v. Weston*, namely, that the property converted belonged to the plaintiff; and in addition to that, in this case it was assumed in the charge of the judge that

the bonds were confessedly the property of the plaintiff, and to that statement the defendant made no objection.

2. The sole question raised by the defendant's exceptions to the refusal to give the second and sixth rulings asked for, is the question whether there was evidence on which the jury would have been warranted in finding under proper instructions that the cause of action for converting the six bonds delivered to the defendant in June, 1891, was not barred by the statute of limitations. It does not appear whether any instructions were or were not given to the jury on the point. We think that there was evidence on which the jury would have been warranted in finding under proper instructions that there was a fraudulent concealment of the cause of action. The plaintiff's case was that the defendant falsely represented to her that the spirit of her departed husband spoke to her through the defendant, that she believed the representation and relied on it, and relying on it gave the bonds to the defendant. Under the instructions of the court the jury must have found that this was a deception. According to the plaintiff's evidence the deception was kept up until a year before the suit was begun. The only evidence as to the time when the plaintiff's eyes were first opened to the fact that there was a deception is her testimony that she had her last spiritual séance in 1896; in that séance the defendant pretended to act as a medium through whom the plaintiff was conversing with her dead husband, and the plaintiff testified: "I said, 'You have taken everything from me, and have given it to the medium.' 'Well,' he said, 'if I had as much again I would give it to the medium.'" The plaintiff further testified: "'Don't you tell me,' I said, 'that it is Mr. Byron. That is never my husband talking, nor is it a spirit. That is Mrs. Ross herself.'"

We do not agree with the defendant's contention that if a defendant, who falsely represents that the spirit of a dead husband speaks through the defendant's lips, and thereby obtains the plaintiff's property, is successful in continuing the deception for six years next after the last cent of the plaintiff's property has been obtained, the plaintiff is without remedy when her eyes are opened; on the contrary we are of opinion that in such a case there is concealment of the fraud, and the

plaintiff can sue within six years after she discovers that she has been duped. *Manufacturers' National Bank v. Perry*, 144 Mass. 313; and see *Graham v. Stanton*, 177 Mass. 321. It does not lie in the mouth of a defendant who has fraudulently succeeded in bringing a plaintiff under such a delusion to set up that the plaintiff had means of ascertaining the truth within the rule of *Farnam v. Brooks*, 9 Pick. 212, 244, relied on by the defendant.

3. The evidence that the plaintiff bought three of the bonds and paid par for them was evidence that they were worth par; the evidence that the other twelve were bonds of the same issue, coupled with that evidence, was sufficient to warrant a finding that they also were worth par.

4. The defendant's last two contentions are that no one can say that spirits do not speak through mediums, and that if the deception was so obvious that the plaintiff ultimately found it out she cannot rely on having been deceived by it but ought to have found it out before. As to the first contention it is enough to say, without going further, that the defendant did not rest her case on the truth of her representations that the plaintiff's dead husband spoke to the plaintiff through her, the defendant, but on the flat denial of the whole story told by the plaintiff; and of the second contention it is enough to say that the defendant made the representations to the plaintiff immediately after the death of her first husband, and her eyes seem to have been opened at or about the time she was married to her second husband.

Exceptions overruled.

MICHAEL FREEMAN, JR. vs. CITY OF BOSTON.

Suffolk. January 15, 1901. — April 2, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

No appeal lies from the decision of a presiding judge of the Superior Court overruling a motion for a new trial on the ground of newly discovered evidence.

Under Pub. Sta. c. 153, § 7, providing that in all cases in which a motion for a new trial is not sustained, the court may in its discretion impose upon the moving party such sum to be taxed in the costs of the suit as it shall deem proper, a motion that a sum be imposed as such costs must be made in the court in which the case was tried.

PETITION to recover damages for land and buildings taken in January, 1895, for the extension of Columbus Avenue in Boston, filed January 1, 1896.

This case was tried in the Superior Court, before *Fessenden, J.*, and the jury returned a verdict for the petitioner for \$12,416.25. The petitioner moved for a new trial on the ground of newly discovered evidence. The motion was denied by the judge, who made certain findings and allowed exceptions, whereon it was held by this court, in a decision given January 12, 1900, and reported in 175 Mass. 208, that it did not appear that the judge exceeded his powers in refusing a new trial. Thereafter, on February 3, 1900, the petitioner filed in the Superior Court another motion for a new trial, on the ground of newly discovered evidence, the nature of which was stated in his petition. On June 21, 1900, *Fessenden, J.*, overruled this motion and amended his former findings, previously before this court, so that his second finding made upon the previous motion for a new trial should read as follows: I find "If material and competent, that Jesse L. Nason, who testified as a witness at the trial of the above cause, did not, in August, 1895, see the petitioner's building, the value of which was a subject of inquiry at the trial; that he was mistaken in his testimony as to when he saw the buildings; that he did see them before they were removed, and made memoranda concerning their dimensions and valuations; that the written memorandum or report made by said Nason to the City Solicitor was made in 1896 from the said memoranda;

and that the date of the said report was afterwards changed so as to read 1895, and then delivered to said City Solicitor."

From the order of June 21, 1900, overruling the petitioner's motion for a new trial, and from the judgment of the Superior Court in the case, the petitioner appealed.

At the argument of the case before this court, the respondent moved that the court impose upon the petitioner a sum to be taxed in the costs of the suit under Pub. Sts. c. 153, § 7, and asked that a sum of at least \$500 be thus taxed against him as a penalty for his conduct in the case.

L. D. Brandeis, W. H. Dunbar & G. R. Nutter, for the petitioner, submitted the case on a brief.

T. M. Babson, for the respondent.

KNOWLTON, J. This appeal presents no question of law. The motion for a new trial on the ground of newly discovered evidence was addressed to the discretion of the court, and the decision of the presiding justice cannot be revised in this court on appeal. *Shea v. Lawrence*, 1 Allen, 167, 170. *Lowell Gas Light Co. v. Bean*, 1 Allen, 274. *Stetson v. Medford*, 109 Mass. 242. *Behan v. Williams*, 123 Mass. 366. *Perry v. Shedd*, 159 Mass. 200.

The motion of the respondent that a sum be imposed upon the petitioner to be taxed in the costs of the suit under the Pub. Sts. c. 153, § 7, should be made in the Superior Court.

Judgment affirmed.

ALL SAINTS PARISH vs. INHABITANTS OF BROOKLINE.

SAME vs. SAME.

Norfolk. January 15, 1901. — April 2, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER,
HAMMOND, & LORING, JJ.

Under Pub. Sts. c. 11, § 5, cl. 7, exempting from taxation "houses of religious worship owned by a religious society," land purchased by a religious society for the erection of a church thereon for which plans have been prepared is not exempt from taxation until the construction of the church has begun.

A religious society purchased a lot of land containing 40,955 square feet on the corner of a suburban avenue, for the construction of a large stone church thereon, for which plans had been prepared. On account of insufficient funds, the construction of the stone church was not begun for more than two years thereafter, but upon one side of its intended site a small wooden church was built and used for worship, which on the completion of the stone church was to be removed to the corner of the lot to be used for a Sunday school. The assessors of the town, in the two years before the beginning of the construction of the stone church, assessed a tax on twenty thousand square feet of the lot, exempting from taxation the wooden church building and the remainder of the land, not designating by any line of division the land assessed and the land exempted. There was no fence on the premises except that enclosing the whole as one lot. *Held*, in an action by the society against the town to recover back the taxes assessed as above and paid under protest, that the burden was on the plaintiff to show that the whole lot was exempt from taxation, as, if any part of it was taxable, the plaintiff's remedy was by application for an abatement; and that there was no error in assessing the tax upon the portion of the lot which was intended for the erection of the stone church, there being no house of religious worship nor any part of such a house upon it, and it not being shown that the whole lot was needed for the small wooden church or that it was used as a reasonably necessary or proper incident to the maintenance and use of that church. *BARKER, J.*, dissenting, on the ground that the whole lot from the date of its purchase by the parish had been dedicated to public worship, and that the immediate erection and continued use of a temporary wooden church, and the prosecution with all reasonable promptness of the work of building a permanent church, were the same in legal effect as if the stone church had been begun when the wooden one was.

TWO ACTIONS OF CONTRACT to recover back taxes assessed by the town of Brookline for the years 1897 and 1898 upon certain land owned by the plaintiff and paid under protest July 1, 1898, and October 18, 1898, respectively. Writs dated July 6 and October 21, 1898.

The cases were heard in the Superior Court, by *Hardy, J.*, without a jury, upon the following agreed facts, subject, however, to all questions as to the competency and materiality of these facts, and upon the offer of proof hereinafter mentioned:

The plaintiff made due demand for the repayment of the taxes before beginning its actions. The plaintiff was incorporated on February 8, 1895, as a religious corporation. By deed dated June 28, 1895, Henry M. Whitney and others, trustees of the West End Land Company, conveyed to the plaintiff a certain parcel of land situated on Beacon Street and Dean Road in Brookline, and bounded northwest on Beacon Street 178.21 feet; northwest, north and northeast by a curved line making the corner of said Beacon Street and Dean Road

30.90 feet ; northeast on Dean Road 185.73 feet ; southeast 202.61 feet on other land of the trustees, and southwest on land now or late of the estate of Thomas Chamberlin 205 feet ; containing 40,955 square feet.

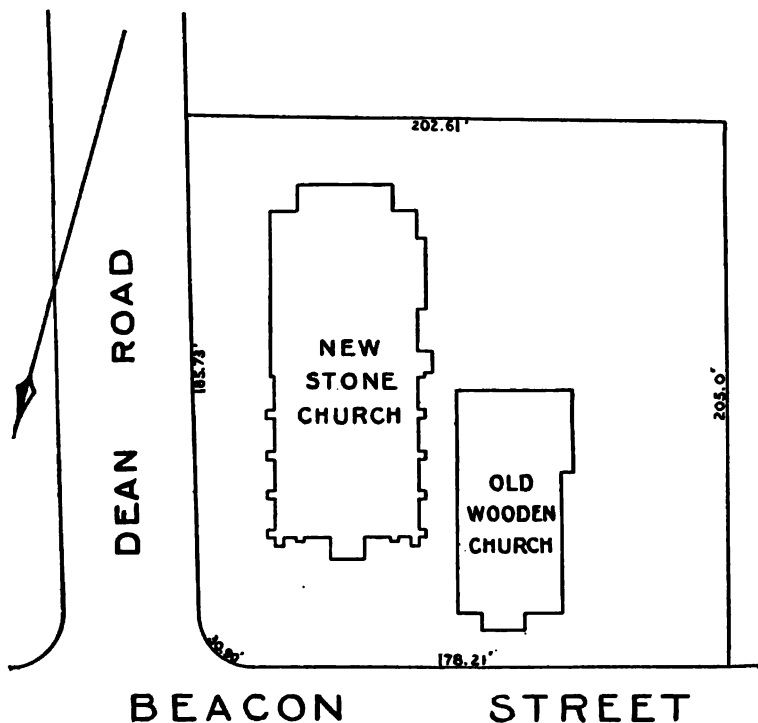
It was provided in the deed that "Said parish by the acceptance hereof, agrees to begin forthwith and proceed with the construction of a church edifice for the use of the said parish on the described premises."

Before the actual purchase of this land the plaintiff had had prepared plans for the construction of a church edifice and parish rooms, the plaintiff then having a bond for a deed from the owners of the land. The plaintiff caused to be erected on the lot a wooden church building which was completed in September, 1895. This building has been continuously occupied and still is used as a house of religious worship. In the meantime unremitting effort was made by the plaintiff to raise sufficient money by subscription for the construction of a stone church building as designed by the original plan. Before May 1, 1898, sufficient money had been subscribed to enable the plaintiff to proceed with the work of building the church edifice provided for by the original plan. On May 31, the plaintiff notified its architects to make quarter scale drawings and specifications to be submitted to builders for their estimates. On June 21, the architects were authorized to proceed with the erection of the first section of the stone church. On September 10, work upon the stone church was begun, and progressed continuously until the autumn of 1899, when it was ready for public worship and has since then been continuously in use, though some work yet remains to be done upon it. Upon the completion of the new church the present wooden church is to be removed to the southwesterly corner of the lot to be used as a Sunday school room, in accordance with the original plans above referred to.

No building has been erected upon any portion of the lot except the wooden church and the stone church now building. There are no fences on the lot except that running around it on the outside, and the land has never been leased or occupied by any parties other than the plaintiff since its purchase by the plaintiff.

On May 1, 1897, and on May 1, 1898, the assessors of Brookline assessed a tax on twenty thousand square feet of the lot, and in each of those years exempted from assessment and taxation the wooden church building and the remainder of the land.

The following plan shows the ground lines of the wooden church and of the stone church on the lot as of December 30, 1899.



There is no separation by fence or otherwise of the part exempted from the part taxed, and all is part of the same lot within the fence enclosing it. The assessors drew no line of division between the land assessed and the land exempted.

The plaintiff, under its deed from the trustees, assumed the taxes for 1895, which were paid by it. In 1896 and in 1899 no part of the land was assessed for taxation.

The plaintiff had not at the time of purchasing the land in question, and never had and has not now, any intention of using any part of the land taxed for secular purposes, and the plaintiff

regards and always has regarded the land not already built upon as necessary for convenient ingress and egress, light, air and appropriate and decent ornament, and as necessary to prevent too great proximity of other buildings and uses of the land which might be deleterious. The plaintiff owns no other real estate in the Commonwealth.

The plaintiff offered to introduce the testimony of an experienced architect, a landscape gardener, and of real estate experts who were familiar with and competent to testify to the value of land in the vicinity, tending to show that at the time the taxes were assessed, the entire lot of land owned by the church was not more than was sufficient for convenient ingress and egress, light, air and decent and appropriate ornament for said buildings now on the land, and was necessary to prevent the too great proximity of other buildings and uses of the land which might be deleterious to the church.

Upon objection by the defendant the judge rejected this evidence and found for the defendant, and at the request of the parties reported the cases for the consideration of this court.

If such evidence ought to have been admitted in either or both cases, that case or both cases were to stand for trial. If the ruling rejecting the evidence was right, and the court should be of the opinion that the plaintiff was entitled to recover the tax assessed for the year 1897, judgment was to be entered in its favor for the amount of that tax, to wit: \$152.46, and interest thereon from July 1, 1898, in the action brought July 6, 1898; otherwise judgment was to be entered for the defendant in that action. If the rejection of the evidence was right, and if the plaintiff was entitled to recover the tax assessed for the year 1898, judgment was to be entered in its favor for the amount of that tax, to wit: \$141.60, and interest thereon from October 18, 1898, in the action brought October 21, 1898; otherwise judgment was to be entered for the defendant in that action.

The cases were argued at the bar in January, 1901, and afterwards were submitted on briefs to all the justices.

M. R. Sears, for the plaintiff.

C. A. Williams, for the defendant.

KNOWLTON, J. The land owned by the plaintiff at the corner of Beacon Street and Dean Road in Brookline, is in general

dimensions equivalent to a lot a little more than two hundred feet square. It is now used, and is intended to be used, in connection with houses of religious worship erected upon it. On May 1, 1897, when the first tax in controversy was assessed, the plaintiff had not made the financial arrangements necessary to the commencement of the work of building its stone church, and on May 1, 1898, when the next tax was assessed, although sufficient money had been subscribed for that purpose, it had not got its drawings and specifications ready to be submitted to the builders for their estimates, as a preliminary to the making of a building contract. Not until September 10, 1898, was work upon the stone church actually begun. When the taxes in controversy were assessed, the plaintiff, therefore, was the owner of this lot of land, intended to be used as a site for a stone church. Upon one side of it, leaving unoccupied the part intended for the stone church, was a small wooden church, which, on the completion of the stone church, was designed for removal to the southwesterly corner of the lot, there to be used as a Sunday school room.

The question is whether the whole lot was exempt from taxation by reason of the erection of the small wooden church near one side of it and the intention of the plaintiff to erect a stone church to occupy a larger place on the other part of it.

The exemption is claimed under the Pub. Sts. c. 11, § 5, cl. 7, which includes among the kinds of property exempt from taxation, "houses of religious worship." This description has been held to include, as incident to such a house, the land around it reasonably necessary "for convenient ingress and egress, light, air, or appropriate and decent ornament." *Third Congregational Society v. Springfield*, 147 Mass. 396, 398. *Trinity Church v. Boston*, 118 Mass. 164. In the case last cited this clause of the statute was given a liberal construction in favor of the religious society, in a decision which held that land was exempt which had been procured for the erection of a house of religious worship, and used for that purpose by the preparation of the foundation and the driving of piles and the continuance of the work with all reasonable diligence from the time of beginning it. The decision was put upon the ground that the erection of a house of religious worship had been begun and was being prosecuted

without unreasonable delay, and that therefore there was upon the land a house of religious worship within the meaning of the statute. In that case the land was all reasonably necessary for the church which had been begun. This decision represents the extreme limit to which exemption has been extended under this clause, and it is no authority for an exemption of land procured for this purpose on which there is no house of religious worship, either finished or begun.

In these suits the burden is on the plaintiff to show that the whole lot was exempt from taxation. If any part of it was taxable, the plaintiff cannot recover in these actions. Its remedy, if too large a portion of the land was taxed, or if for any reason the tax was too much, was by an application for an abatement. *Boston Water Power Co. v. Boston*, 9 Met. 199. *Hicks v. Westport*, 130 Mass. 478. *Richardson v. Boston*, 148 Mass. 508. *Schwarz v. Boston*, 151 Mass. 226. *Chapel of Good Shepherd v. Boston*, 120 Mass. 212. *Kelley v. Barton*, 174 Mass. 396.

The agreed facts and the report fail to show that there was any error on the part of the assessors in assessing a tax on twenty thousand square feet of the land, after first exempting the small wooden church and 20,955 square feet of the land as belonging with it in the condition on which the lot then was. The portion of the lot which was intended for use in the erection of the stone church could not be exempted, for there was no house of religious worship, nor any part of such a house upon it.

The evidence which was offered and rejected had no tendency to show that the whole lot was needed for the small wooden church, or that it was used as a reasonably necessary or proper incident to the maintenance and use of that church. We are of opinion that the decision of the Superior Court was correct.

Judgment on the findings.

BARKER, J. The plaintiff is a religious society incorporated on February 8, 1895. Its first act was to select the land now its church yard as the place where it would establish the public worship of God. Before acquiring title it procured the plans for its present stone church now thereon. On June 28, 1895, the land was conveyed to it by a deed in which was this clause: "Said parish by the acceptance hereof, agrees to begin forthwith

and proceed with the construction of a church edifice for the use of the said parish on the described premises." The land so purchased was about two hundred feet square, fronting on Beacon Street, at its intersection with Dean Road. An exterior fence surrounds the land which is one lot with no division fences. Having no other place of worship the parish at once put the whole lot to the sacred use for which it had been purchased, by erecting upon it a wooden church building, completed in September, 1895, and since continuously used for religious worship. Since that time the whole lot has been as a church yard in the sole occupation of the parish and used by it for the sole purpose of promoting the public worship of God both in the use of its temporary edifice and for the purpose of erecting upon it the permanent stone church. While worshipping in its temporary church the parish has made unremitted efforts to raise money to build the permanent one, but notwithstanding these efforts the work of constructing the stone church was not begun until September 10, 1898. In the meantime the assessors of Brookline, deeming that the parish had devoted an undue quantity of land to the worship of God, had assessed twenty thousand square feet of the church yard for taxes of the years 1897 and 1898. Whether the taxes so assessed were legal or illegal is the question in these cases.

Since the church yard was bought by the plaintiff it has never been leased nor occupied by any other parties. The parish never has had any intention of using any part of it for secular purposes, and has always regarded the whole lot as necessary for convenient ingress and egress, light, air, and appropriate and decent ornament, and as necessary to prevent too great proximity of other buildings and uses which might be deleterious. At the trial in the court below the plaintiff offered evidence tending to show that in fact the whole lot was so necessary, and this evidence was rejected. No tax was assessed upon the church yard, or the church for the year 1896. In the assessments of 1897 and 1898 the assessors drew no line of division between the land which they assessed and the land exempted by them, but assessed a tax upon twenty thousand square feet of the land, and exempted from assessment and taxation the wooden church building and the remainder of the land, thus

allowing for God's acre but 20,955 feet and that in a suburban town. Since the year 1898 no tax has been assessed upon either the church yard or the church buildings.

The necessary legal inference from these facts is that the whole lot, from the date of its purchase by the parish to the present time, has been appropriated actually and in good faith by the parish for the sole purpose of public worship, and that the whole lot has been in constant use by the parish itself and only for that purpose and for purposes connected with it.

Such land has never before been subjected to taxation in the territory now comprised within the limits of this Commonwealth, except in the single instance in which in the year 1873 the then newly purchased site of Trinity Church was taxed by the assessors of Boston. That tax was held illegal by this court, not because there was a house of religious worship upon the land taxed, but because the land had been appropriated by its owner, a religious society, to be used for purposes of religious worship, which appropriation this court held secured the statutory exemption. *Trinity Church v. Boston*, 118 Mass. 164, 165.

For a period of two hundred and sixteen years the doctrine that the church yard and the church were public works was of itself sufficient to secure for them an unbroken exemption from taxation. Until April 1, 1836, there was no statutory exemption of land or building. Yet neither were taxed, and for the same reason which, without any statutory declaration to this day has exempted court houses, jails, houses of correction, school houses, town houses, and city halls, with their grounds, and also highways, canals, and lands and structures within the location of railroads. The only statutory provisions relating, though remotely to the subject were those which from the year 1799 exempted from taxation, except for parochial purposes, pews in houses of public worship, although the pews were the private property of individuals, which they could lease, mortgage, sell and convey or devise by will at their pleasure, and which could be taken by legal process for the debts of the individual owner. See St. 1799, c. 49, § 2, and the subsequent acts for raising State taxes.

The Revised Statutes for the first time made a statutory provision exempting houses of religious worship from taxation.

Rev. St. c. 7, § 5, cl. 5. Since that provision went into effect the courts have treated the exemption as statutory. It was first construed by this court in October, 1840, in *Proprietors of South Congregational Meetinghouse v. Lowell*, 1 Met. 538, in which, in the case of a church and vestry the ground floors of which were made into six stores or shops and let for trade, it was held "that the exemption in the statute extended to that part of the property only which was used as a place of worship, and for purposes connected with it," and that it "did not extend to separate tenements used for purposes exclusively secular." In that case there was no contention that any part of the land was taxable.

This decision in effect was that not only property actually used as a place of worship, but property used for purposes connected with it, is exempted by force of the exemption given by the statute to "houses of religious worship." That this construction was consonant to the view of the Legislature is shown by the enactment on March 18, 1841, of St. 1841, c. 127, which declared, "Whenever any building, now exempt by law from taxation, is appropriated in part only to the purposes of religious worship, and in part to other purposes, the owners of such building shall be taxed according to the seventh chapter of the Revised Statutes, for the value of all parts of such building not so appropriated to the purpose of public worship."

The general revision of the laws which took effect on June 1, 1860, continued the statutory exemption in these words: "Houses of religious worship, and the pews and furniture (except for parochial purposes); but portions of such houses appropriated for purposes other than religious worship shall be taxed at the value thereof to the owners of the houses." Gen. Sts. c. 11, § 5, cl. 7.

In the year 1865 the clause in question was amended by a provision that "only such houses of religious worship are exempted from taxation as are owned by a religious society, or held in trust for the use of religious organizations." St. 1865, c. 206.

This was the state of the statutes when the case of *Trinity Church v. Boston* came here for decision. The plaintiff was a religious society duly incorporated. It had the lot on Summer Street on which had stood its church which was destroyed by the great fire of 1872. It had abandoned that lot as a site for a

house of religious worship. Before the fire it had purchased the site of its present church, intending to build upon it a new house of worship. The work of building the new house was begun by driving a part of the piles for the foundation, before the assessment was laid, but no further progress had been made in the erection of the building, that being as far as the work could be reasonably advanced during the winter after the fire.

Upon these facts the new site was held by this court to be exempted by force of the statute, the purpose of which, the decision holds was to relieve religious societies "from the burden of taxation upon property devoted to public uses." The court says, "It is not essential that the property thus exempt should be actually used, or should be in a condition to be actually used, for purposes of religious worship. Such a construction would exclude from the benefits of the statute all unfinished houses of worship, and all which by accident or want of repair had become temporarily unfit for use, or the use of which had for any reason been temporarily suspended. The occupation for religious purposes, which the statute contemplates, does not require the actual completion of the structure. And such occupation continues, notwithstanding temporary interruptions in its use."

In that case, as in the present cases, it was not necessary to say whether land only may, under some circumstances, be exempt although no building has actually been begun upon it. In that case a church had been begun, and in the present cases a church had been finished and was in use when the land was assessed for taxes. The court in that case held "that real estate held by a religious society, not more than sufficient in extent to meet its reasonable requirements in this respect, and devoted by such society in good faith to the erection of a church edifice; upon which the work of erection already commenced is prosecuted without unreasonable delay; and being all the real estate which is so held, is entitled to the exemption given by the statute."

In the year 1879 this doctrine was reaffirmed by the court in the case of the *Old South Society v. Boston*, 127 Mass. 378, 379. It was there said that the reason of the exemption of unfinished churches and of those temporarily unused is "that, although

the property is not actually in present use for purposes of religious worship, yet it is held in good faith for such uses and none other."

In the year 1880 the court again stated the doctrine thus: "Real estate held by a religious society, not more than sufficient in extent to meet its reasonable requirements in this respect, [that is for purposes of religious worship,] and devoted by such society in good faith to the erection of a church edifice, is entitled to the exemption given by the statute. But it is the appropriation of the property to the sacred uses contemplated which secures this privilege." *Redemptorist Fathers v. Boston*, 129 Mass. 178, 180.

With all these decisions construing the statute to exempt land devoted by a religious society in good faith to the erection of a church edifice before it, the Legislature must be taken to have reaffirmed the statute as so construed, by re-enacting it in the general revision of the laws made by the Legislature of 1881. See Pub. Sts. c. 11, § 5, cl. 7.

Since that affirmation there has been nothing to change the test of the statutory exemption. The case of the *Third Congregational Society v. Springfield*, 147 Mass. 396, was not one concerning a house of worship, but a parsonage. The statement in the opinion that "The Legislature intended to limit the exemption to the houses of religious worship alone, or to the portions of an edifice appropriated therefor, and their pews and furniture," must be read with the earlier statement of the same decision that "Undoubtedly within this exemption would be included, not merely the building itself, but a reasonably sufficient territory around it for convenient ingress and egress, light, air, or appropriate and decent ornament." The decision was not intended to, and did not, overrule the construction given to the statute in *Trinity Church v. Boston*, affirmed in *Old South Society v. Boston*, and in *Redemptorist Fathers v. Boston*, and since uniformly applied until now. Taken literally the language first quoted would make all church yards taxable, a position for which no one contends. The later statement in *Harvard College v. Cambridge*, 175 Mass. 145, at page 149, "that the exemption was limited to houses of religious worship only" must be read with a like qualification. In both these decisions the court used

the phrase "houses of religious worship" in the sense which it had decided, in *Trinity Church v. Boston*, that they bore. This meaning exempts land owned by a religious society and in good faith appropriated by it to religious worship and purposes connected with it, one of which connected purposes is the ultimate and speedy construction of a permanent building to replace a temporary church actually in use, and the actual beginning of the construction of a house for religious worship upon the land shows conclusively the dedication of the land to public worship. There can be no distinction between the beginning of such a house, and the completion and use in worship of a temporary house, which does not work in favor of rather than against the right to exemption in the present cases.

Upon the facts before us all the land owned by the plaintiff on May 1, 1897, and on May 1, 1898, was but one lot. It was bought for a church yard only, and since its purchase has been held and used only to enable the parish to build and to use upon it in public worship its temporary wooden and its permanent stone church. The immediate erection upon the lot, and the continued use for public worship of a temporary wooden church, with the prosecution with all reasonable promptness of the work of building a permanent church, are certainly no less conclusive of the appropriation of the land to the purpose of religious worship, than the circumstances which were held to be conclusive in *Trinity Church v. Boston*. In this case as in that the undisputed facts make it certain that when the tax was laid the whole land was land appropriated to the "sacred uses," which appropriation, in the language of that decision, "secures the exemption."

As the whole of each tax was invalid, the plaintiff was entitled to judgment in each case, and such judgment should be entered in accordance with the terms of the report.

THOMAS C. GILLINGHAM, administrator, vs. THOMAS
W. BROWN.

Suffolk. November 14, 1900. — April 3, 1901.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

Under Pub. Sta. c. 197, § 15, providing, that an acknowledgment or promise, in order to take an action of contract out of the operation of the statute of limitations, must be "made or contained by or in some writing signed by the party chargeable thereby," and § 16 of the same chapter providing, that "nothing contained in the preceding section shall alter, take away, or lessen the effect of a payment of principal or interest made by any person," a part payment may be proved by oral evidence and the language accompanying the payment is admissible to show the intent with which it was made.

In an action on a promissory note, where a part payment by the defendant is relied upon to take the case out of the statute of limitations, if it appears that after the period of limitation had expired the defendant made an oral promise to pay the note in monthly instalments of \$10 each, and that he paid \$5 under this agreement, the only promise that can be inferred from such payment is a promise to pay by instalments, and the plaintiff can recover only the instalments due at the date of his writ.

Discussion by HAMMOND, J., of the law and authorities as to the character of the acknowledgment, promise or part payment required to take an action of contract out of the operation of the statute of limitations.

CONTRACT upon a promissory note for \$450 dated October 22, 1872, payable on demand. Writ dated April 3, 1899.

The answer, among other things, set up the statute of limitations.

At the trial in the Superior Court, before *Richardson, J.*, the plaintiff produced the note, and there appeared thereon three indorsements, respectively, of the following tenor: "Jan. 22, Rd twenty-five." "April 18, Rd twenty-five dolls." "April 27th, 1898, received 5 Five dollars." The plaintiff introduced evidence tending to show that the first and second indorsements were made by the plaintiff's intestate in 1873, and that the payments therein referred to were then made by the defendant after a demand made upon him; that no further payments were made except as follows: that some time in February, 1898, the defendant orally agreed to pay the note in monthly instalments of \$10 each, the first instalment to be paid by a check to be sent by him the following month; that the defendant, having failed

to pay this instalment, a Mrs. Noble, sister of the plaintiff, acting by his authority, on or about the date of the third indorsement called upon the defendant at his place of business, and demanded payment "of the ten dollars" or a payment "on account of the note"; that the defendant said he could not pay her \$10, but would pay her \$5, and did so, and that upon returning to her home she made the third indorsement.

The defendant admitted giving her the \$5, but testified that "it was an act of charity" and "to get rid of her," and that in giving it he stated that it was not on account of the note, and denied agreeing to pay in monthly instalments of \$10 each.

The defendant asked the judge to instruct the jury, "That if the jury should find that the defendant agreed to pay the note only in instalments of ten dollars per month, and that the payment of the five dollars was given and taken in pursuance thereof, the plaintiff could only recover the instalments due to the date of the writ."

The judge refused to give this instruction, but instructed the jury, that if they found that the defendant made a payment on account of the note at or about the date of the third indorsement their verdict should be for the plaintiff for the amount of the note with interest from the date of the demand for payment, if any demand was made, after deducting the payments indorsed on the note. To this refusal and instruction the defendant excepted. The judge gave appropriate instructions to the jury on all other questions in the case in terms not objected to.

The jury found for the plaintiff in the sum of \$1,049.40; and the defendant alleged exceptions.

S. H. Tyng & G. M. Hobbs, for the defendant, submitted the case on a brief.

S. W. Clifford, for the plaintiff.

HAMMOND, J. This is an action upon a demand note dated October 22, 1872. At the trial, the plaintiff, in order to meet the defence of the statute of limitations, proved that the defendant delivered to the agent of the plaintiff in April, 1898, \$5; and the chief question was whether this money was delivered in part payment of the note, and, if so, whether under the circumstances it had the effect of making the defendant liable to pay the remainder of the note at once, or only by instalments.

The plaintiff's evidence tended to show that in February, 1898, the defendant orally agreed to pay the note in monthly instalments of \$10 each, the first instalment to be paid on the first of the following month; that, the defendant failing to pay as promised, the plaintiff's sister as his agent called upon the defendant and demanded payment "of the ten dollars," or a payment "on account of the note"; that the defendant said he could not pay \$10, but would pay her \$5, and did so, and the payment was indorsed on the note.

The defendant admitted giving the agent the \$5, but testified that "it was an act of charity" and that it was done "to get rid of her," and that in giving it he stated that it was not on account of the note; and he denied that he ever agreed to pay in monthly instalments.

In this state of the evidence the defendant asked the court to rule that if the jury should find that the defendant agreed to pay the note only in instalments of \$10 per month, and that the payment of the \$5 was given and taken in pursuance thereof, the plaintiff could only recover the instalments due to the date of the writ. The court declined so to rule, and instructed the jury in substance that if the defendant made this payment on account of the note their verdict should be for the plaintiff for the amount of the note and interest from the date of demand, after deducting the payments indorsed on the note. To the refusal to rule as above requested and to the ruling given the defendant excepted. The jury found for the plaintiff in the sum of \$1,049.40.

The verdict shows that the jury found that the \$5 was paid by the defendant on account of the note and not as an act of charity as he contended. But it does not settle the question whether it was paid in pursuance of an agreement to pay on instalments, or upon the note generally without reference to that agreement; and, since the evidence would warrant a finding either way on that question, it is plain that if it was material it should have been submitted to the jury.

The St. 21 Jac. I. c. 16, in which first appears a limitation as to the time of bringing personal actions, and upon which are modelled the various statutes of limitation in the United States, expressly provides that all such actions should be brought within

the times therein prescribed; and it makes no mention of the effect of a new promise, acknowledgment or part payment. In every form of action but that of assumpsit, the construction has been in unison with the express words of the statute, but, as to that action, the statute has had a varied experience in running the gauntlet of judicial exposition. There was early read into it a provision that in an action of assumpsit a promise of payment within six years prior to the action would avoid the statute, but that a confession, or simple acknowledgment by the debtor that he owed the debt would not be sufficient. *Dickson v. Thomson*, 2 Show. 126. At a later period, however, it was held that an acknowledgment was evidence from which a jury might properly find a new promise to pay. *Heyling v. Hastings*, 1 Ld. Raym. 421; *S. C.* Comyns, 54. Still later, Lord Mansfield said in *Quantock v. England*, Burr. 2628, that the statute did not destroy the debt, but only took away the remedy; and that if the debt be older than the time limited for bringing the action the debtor may waive this advantage, and in honesty he ought not to defend by such a plea, "and the slightest word of acknowledgment will take it out of the statute." In *Tanner v. Smart*, 6 B. & C. 603, however, the pendulum swung the other way, and Lord Tenterden, C. J., after saying that there were undoubtedly authorities to the effect that the statute is founded on a presumption of payment, that whatever repels that presumption is an answer to the statute, that any acknowledgment which repels that presumption is in legal effect a promise to pay the debt, and that, though such acknowledgment is accompanied with only a conditional promise or even a refusal to pay, the law considers the condition or refusal void, and the acknowledgment itself an unconditional answer to the statute, proceeds in an able opinion to say in substance that these cases are unsatisfactory and in conflict with some others, and that the true doctrine is that an acknowledgment can be an answer to the statute only upon the ground that it is an evidence of a new promise, and that, while, upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may and ought to be implied, yet, where a debtor guards his acknowledgment and accompanies it with a declaration to prevent any such implication, a promise to pay could not be raised by implication. This is a leading case in England on this subject.

In this country, it has very generally been held that the statute of limitations is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands after the true state of things may have been forgotten, or may be incapable of explanation by reason of the loss of evidence, that if a new express promise be set up in answer to the statute, its terms ought to be clearly proved, and that, if there be no express promise, but a promise is to be raised in law from the acknowledgment of the debtor, such an acknowledgment ought to contain an unqualified admission of a previous subsisting debt for which the party is liable and which he is willing to pay. It follows that if the acknowledgment be accompanied by circumstances, or words, which repel the idea of an intention to pay, no promise can be implied. *Bell v. Morrison*, 1 Pet. 351. *Jones v. Moore*, 5 Binn. 573. *Berghaus v. Culhoun*, 6 Watts, 219. *Sands v. Gelston*, 15 Johns. 511. *Danforth v. Culver*, 11 Johns. 146. *Purdy v. Austin*, 8 Wend. 187. In this last case the court say that the statute is one of repose and should be maintained as such; that, while the unqualified and unconditional acknowledgment of a debt is adjudged in law to imply a promise to pay, the acknowledgment of the original justice of the claim without recognizing its present existence is not sufficient; and that anything going to negative a promise or intention to pay must be regarded as qualifying the language used.

This doctrine was approved by this court in the leading case of *Bangs v. Hall*, 2 Pick. 368, in which Putnam, J., after a review of the authorities, says: "On the whole, we are satisfied that there must be an unqualified acknowledgment, not only that the debt was just originally, but that it continues to be so, . . . or that there has been a conditional promise which has been performed, as is before explained."

To answer the statute there must be a promise express or implied from an acknowledgment of the debt as a present existing debt. If the promise whether express or implied be conditional, it must be shown that the conditions have been fulfilled. *Cambridge v. Hobart*, 10 Pick. 232. *Sigourney v. Drury*, 14 Pick. 387. *Krebs v. Olmstead*, 137 Mass. 504.

While the original debt is the cause of action, *Isley v. Jewett*,

3 Met. 439, the liability of the debtor is determined not by the terms of the old but by those of the new promise. As stated by Vice Chancellor Wigram in *Phillips v. Phillips*, 3 Hare, 281, 300, "The new promise, and not the old debt, is the measure of the creditor's right. . . . If the debtor promises to pay the old debt when he is able, or by instalments, or in two years, or out of a particular fund, the creditor can claim nothing more than the promise gives him." *Custy v. Donlan*, 159 Mass. 245. *Boyn-ton v. Moulton*, 159 Mass. 248.

Pub. Sts. c. 197, § 15, provides that no acknowledgment or promise shall be evidence of a new or continuing contract to take the case out of the operation of the statute, unless contained in some writing signed by the debtor, and in § 16, that nothing in this provision shall be taken to alter, take away or lessen the effect of a part payment of principal or interest; and it may be contended that the effect of these two sections is to exclude all parol evidence whatever bearing upon an acknowledgment or new promise by part payment or otherwise, whether the creditor be attempting to avail himself of it for attack, or the debtor for defence. But that does not seem to us to be the result. The language is that the provision of the fifteenth section shall not be taken to alter, take away or lessen the effect of part payment. But what was the effect of part payment before this statute requiring the promise or acknowledgment to be in writing? Its effect depended upon the circumstances. If a debtor made a part payment as such, it was considered as an acknowledgment that the whole debt was due, otherwise it could not be a part payment; and so it stood upon the same footing as any other unconditional acknowledgment, and from it the law, in the absence of anything to the contrary, implied a promise to pay the whole. It had no validity to answer the statute except as an acknowledgment of the debt. In the language of Tindal, C. J. in *Clark v. Hooper*, 10 Bing. 480, in the mind of the party paying such a payment must be "a direct acknowledgment and admission of the debt, and is the same thing in effect as if he had written in a letter to a third person that he still owed the sum in question."

But suppose a debtor says to his creditor "I acknowledge the debt to be just, that it never has been paid, and that I have

no defence except the statute of limitations. I am willing to pay and I do hereby pay to you one half of the debt, but I do not intend to waive the statute as to the rest. On the contrary I insist on my defence as to that, and I never will pay any more." Can it be said that from such a part payment, accompanied by such a distinct affirmation of the debtor's intention not to pay more but to insist upon his defence under the statute, the law would have implied a promise to pay the remaining half?

Again, suppose a debtor says to his creditor "Your claim against me is just, it never has been paid, and my only defence to it is the statute of limitations. I am not able to pay it now, but I will pay it when and as fast as I am able, but I will not pay in any other way, and I insist upon my defence under the statute except so far as I now waive it. I am able to pay and I do now pay you ten dollars with this understanding." Can it be said that from such a part payment the law would have implied a promise to pay the debt according to its original terms?

To come a little more closely to what the jury might have found the facts to be in this case, suppose the debtor agrees to pay in instalments and in no other way, and clearly declares his intention to pay in no other way, and then makes a payment in compliance with the new promise. Can it be said that from such a part payment the law would have implied a promise to pay the debt in any other way? Such an interpretation of the words and act of the debtor would be inconsistent with the understanding of both parties, and would be unreasonable and unjust.

Such a partial payment as that named in either of the three cases above supposed must be construed as a conditional and not an absolute waiver. The waiver must be taken as it is, absolute if absolute, conditional if conditional. And on principle that must be so, whether it be found in a verbal promise or in a payment. There is no ground for a satisfactory distinction between a waiver by word and a waiver by an act. Each is evidence of a new promise and operative only as such; and while the cause of action is the old promise, the measure of the liability is determined by the new one.

Now it is expressly declared in Pub. Sts. c. 197, § 16, that the

provisions of the preceding section shall not be taken to alter, take away or lessen the effect of a part payment. There can be no doubt that prior to the passage of the law contained in § 15 a partial payment made in pursuance of an agreement to pay by instalments did not have the effect of making the debtor liable in any other way. To say that the provisions of § 15 do have that effect is to alter the effect of such a part payment, and so is inconsistent with § 16. The law with respect to part payment is to remain as before, and the language accompanying the payment is admissible to show the intent with which the payment is made, just as it was admissible before, and that is so whether or not it contains a promise to pay upon which the creditor could have maintained an action prior to the requirement that it should be in writing.

In the case at bar there was evidence tending to show that the defendant had orally agreed to pay in monthly instalments of \$10 each, and if such an agreement had been in writing it could have been enforced according to its terms, but the right of the creditor as against a plea of the statute would have been measured by this new promise; and, even if the debtor had failed to pay, the creditor could recover only the instalment due under the terms of the agreement; and that would be so even if the defendant had made several of the payments. The creditor could take the money under the terms which the debtor had prescribed, and upon no other.

And by the reason of the thing the same principle must apply where the payment is made upon an agreement which, not being in writing, could not be enforced. If this \$5 was paid in part performance of his agreement to pay by instalments, then it cannot be inferred that he intended to recognize the existence of the old debt as an actual subsisting obligation in any other way. The nature of the act is to be determined by the intention of the debtor as shown by the act, his words, and the circumstances accompanying and explaining it. *Taylor v. Foster*, 132 Mass. 30. *Roscoe v. Hale*, 7 Gray, 274. See also 13 Am. & Eng. Encyc. of Law, 750 *et seq.*, for a good collection of the cases.

While in this case the evidence is conflicting, we think it would warrant a finding that the only express promise made by the defendant was to pay in monthly instalments of \$10 each,

and that he paid the \$5 solely under that agreement. If that was so, then no other promise can be inferred from this payment, and the instruction requested should have been given.

Exceptions sustained.

ALEXENE L. HADLOCK, administratrix, *vs.* WILLIAM GRAY
BROOKS.

JOHN F. MERROW *vs.* SAME.

Suffolk. November 16, 19, 1900. — April 3, 1901.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

An agreement that an attorney undertaking to prosecute a suit shall have a share of the thing recovered may not be champertous. In order to make it so, the bargain must contain the further element that the attorney's services shall not create a debt due to him from his client and that his prospective share shall be his only compensation.

There may be circumstances under which an attorney lawfully may agree to give his services to prosecute a suit without charge if unsuccessful and that in case of success and not otherwise his fees shall constitute a debt due to him from his client for which the amount recovered in the suit or a part of it shall be security. The defence of champerty to an action by an attorney for his fees is matter in confession and avoidance and the burden is on the defendant to prove it.

Declarations made by a person afterwards appointed administrator of an estate are not admissible after his appointment as admissions against the estate.

A., having a claim against B. for compensation for services, gave to C. an order on B. for a part of the claim, which was accepted by B. A. died, and D., an attorney, was employed by his administrator to collect from B. the balance of the claim. D. was also employed by C. to collect the order. A certain sum by way of part payment for the services of A. was paid to D. the attorney, and a release for the amount paid was given by the administrator of A. This was without the knowledge of C. Later C. sued B. on the order, and B. contended that as D. was attorney for C. when the part payment was made to him, such part payment should be credited on the order. *Held*, that although D. was attorney for C. the part payment was made to him not in that capacity but as attorney for the administrator of A. and that he could not apply the payment to the claim of his other client, and that the administrator owed no duty to B. to see that the order accepted by B. was paid.

An order was given and accepted as follows: "J. S. Esq., Administrator of A. B. deceased, and Solicitor of the children of said A. B.: Please pay to X. the sum of \$3,000 when the final distribution is made of the sum due by virtue of [a certain decree in a suit named] and charge the same to my account. C. D." "The foregoing order is hereby accepted. J. S., Administrator and Solicitor." There was no evidence that the children of A. B. knew of the order or authorized J. S. to accept it. *Held*, that the order and acceptance bound J. S. per-

sonally. *Held, also*, that the facts, that J. S. was administrator of the estate of A. B. and solicitor for the children, and that there was no money of the estate or of the children in prospect with which to pay the order except what was received under the decree named, did not create an ambiguity which made it necessary to leave the meaning of the contract to the jury. *Held, also*, that the "final distribution" on which the order was payable meant the time of the final entry of the decree ordering the distribution of the whole fund, and not the time when the last dollar of the fund actually should have come to the hands of the person entitled to it.

TWO ACTIONS OF CONTRACT, the first brought by the administratrix of the estate of Harvey D. Hadlock, deceased, to recover a balance alleged to be due from the defendant for services rendered by the plaintiff's intestate as an attorney at law, in behalf of the descendants of Henry Gray in the case of *Codman v. Brooks*, reported in 159 Mass. 477, and 167 Mass. 499, and the second brought by John F. Merrow, to recover the amount of an order for \$3,000, made by said Harvey D. Hadlock and accepted by the defendant. Writs dated June 14, 1898.

The cases were tried together in the Superior Court, before *Lawton, J.* In the first case the plaintiff sought to recover on the ground that by the terms of his employment Harvey D. Hadlock was to and did render the services mentioned on the credit of the defendant, and that soon after the decision reported in 167 Mass. 499, the amount of Hadlock's compensation was settled upon and fixed by him and the defendant at \$8,000, and that the defendant agreed with Hadlock to pay it.

The defendant contended that he had employed Hadlock on behalf and on the credit of the ten children of Henry Gray, who claimed to share in the fund involved in the litigation in *Codman v. Brooks*, and that Hadlock's services in that case were rendered solely on their credit; also that the services were rendered under a champertous and illegal agreement. He denied that he had settled upon \$8,000 or any other sum as Hadlock's fee, or that he had agreed to pay that or any specific sum.

It appeared that the defendant was counsel in the case of *Codman v. Brooks* for the ten children of Henry Gray, a deceased son of William Gray, the elder, the original sufferer, for the loss of whose ships through French privateers Congress had appropriated the fund in controversy in that case, held by Robert Codman as administrator of the estate of William Gray.

Before 1893 the defendant had been appointed administrator *de bonis non* of the estate of Henry Gray, and had associated with him as senior counsel in that case the late Benjamin F. Butler. Shortly after General Butler's death, which occurred in January, 1893, the defendant employed as his associate counsel Harvey D. Hadlock, who continued in the case until its final determination. Hadlock died in the latter part of April, 1897.

The plaintiff called as a witness John F. Merrow, who testified that in the latter part of February, or the first part of March, 1897, he had a conversation with the defendant and Hadlock, in which they both told him that the case of *Codman v. Brooks* had been finally determined in the Supreme Judicial Court of Massachusetts, and that they had settled on the amount that Hadlock was to receive, and agreed on the sum of \$8,000. He also testified that on other occasions after February 22, 1897, both the defendant and Hadlock told him that they had agreed upon the amount of Hadlock's compensation as \$8,000. The plaintiff introduced the testimony of one Greene, a former clerk of Merrow, to the same effect as that of Merrow.

As further tending to show that Hadlock had given credit to the defendant for his services in *Codman v. Brooks*, and that the amount of his compensation had been fixed at \$8,000, the plaintiff introduced in evidence the specifications under the declarations in six suits brought by the defendant severally against six of the children of Henry Gray to recover for services rendered and furnished by him in the case of *Codman v. Brooks*. In each of these cases there was a specification of one tenth of the services of Hadlock in the case of *Codman v. Brooks*, as furnished by the defendant, fixing the value of such tenth at \$800.

The defendant introduced evidence tending to show that he had authority from the ten children of Henry Gray to employ Hadlock in the case of *Codman v. Brooks*, on their behalf, and that Hadlock looked to them and not to the defendant as liable to him for his fees.

The substance of the evidence in regard to the terms of Hadlock's employment alleged by the defendant to be champertous and the contentions of the parties on this issue appear in the opinion of the court.

The order and acceptance sued upon in the second case were as follows: "Boston, June 2, 1896. William Gray Brooks, Esq., Administrator of Henry Gray, deceased, and Solicitor of the children of said Henry Gray: Please pay to the order of John F. Merrow & Co. the sum of three thousand dollars when the final distribution is made of the sum due by virtue of an opinion of the Supreme Court of the United States, and in accordance with a mandate directed to the Supreme Judicial Court of the Commonwealth of Massachusetts within and for the county of Suffolk in the case of William Gray Brooks, *Admr. et al. v. Robert Codman, Admr. et al.*, and charge the same to my account. Harvey D. Hadlock."

"The foregoing order is hereby accepted. William Gray Brooks, Administrator and Solicitor."

The case of *William Gray Brooks, Admr. et al. v. Robert Codman, Admr. et al.*, mentioned in the order, is the same case reported in 159 Mass. 477, and 167 Mass. 499, under the name of *Codman v. Brooks*.

The defendant was as stated above administrator *de bonis non* of the estate of Henry Gray, named in the order, and in the case of *Codman v. Brooks* was solicitor for the ten children of Henry Gray, who were entitled to share in the fund referred to in the order.

When this action was brought, distribution of the entire sum referred to in the order had been made, except of the shares which at the date of the order were due to Charles R. Gray and Frederick W. Gray, two of the children of Henry Gray, which were held by Robert Codman as administrator of the estate of William Gray, the elder.

The plaintiff maintained that he was entitled to recover, although these two shares had not been distributed, because he alleged that their distribution had been prevented by the defendant, and that the defendant had subsequently to the acceptance of the order agreed for a valuable consideration to pay the amount of the order at all events.

The defendant contended, that the order was an assignment of so much of the fund belonging to the children of Henry Gray as on final distribution might come into his hands as administrator of the estate of Henry Gray, or as solicitor of his chil-

dren, and not an undertaking by him to pay anything beyond what he so received in his representative capacity. He also contended that the order was given for the purpose of securing to the plaintiff payment of a part of the compensation which Harvey D. Hadlock was to receive for services as counsel in the case of *Codman v. Brooks*, rendered under a champertous and illegal agreement of which the plaintiff had knowledge. He denied that he had prevented the distribution of the two shares, and contended that he had done all in his power to collect them under assignments to him, but had been prevented from doing so.

The plaintiff introduced in evidence copies of assignments from Charles R. Gray and Frederick W. Gray to the defendant. The defendant, called by the plaintiff as a witness, testified that he took assignments of two of the ten shares of the award and that the two papers were accurate copies of these assignments; and that the assignors were two of the children of Henry Gray. The assignments were dated July 7, 1896, after the decision of the Supreme Court of the United States.

It appeared that the six suits brought by the defendant against six of the ten children of Henry Gray, in which he sought to recover from each of them one tenth of the fees of Hadlock for services in *Codman v. Brooks*, as well as one tenth of his own fees for services in that case, were settled in May, 1898, by the payment of \$5,500.

The defendants in those cases, before settlement, insisted upon a release by the administratrix of Hadlock, then deceased. A release was accordingly given, and \$1,000 of the \$5,500 was paid to Mr. Sampson, then acting as attorney for the administratrix, and who was also at that time the attorney for John F. Merrow, the present plaintiff, for the collection of the order here sued upon. Merrow personally knew nothing of the settlement of these six cases or of the payment of the \$1,000 to Mr. Sampson until after the settlement and payment were made and was not consulted about it in any way.

The other material evidence in the two cases, the rulings asked for and the instructions given are all stated in the opinion of the court.

The jury found for the plaintiff in the first case in the sum of \$2,850 and in the second case in the sum of \$3,000; and the

defendant alleged exceptions in both cases which are stated in the opinion of the court.

J. S. Patton, (*W. G. Brooks* with him,) for the defendant.

C. P. Sampson, for the plaintiffs.

BARKER, J. In each of these cases, tried together before the Superior Court with a jury, there was question whether Hadlock, who acted as senior counsel for the children of Henry Gray in the case of *Codman v. Brooks*, reported in 159 Mass. 477, and 167 Mass. 499, was employed under a champertous agreement.

The defendant's evidence tended to show that by the terms of Hadlock's employment his compensation was to be a percentage of whatever sum should be recovered by his clients in the litigation, and also that it was to be contingent upon their success in securing such a recovery in the action.

In the case brought by Hadlock's administratrix, the defendant Brooks in substance asked the court to rule, that if he employed Hadlock as counsel in the case of *Codman v. Brooks* under an agreement by the terms of which Hadlock's fees and compensation were contingent upon the recovery of some part of the money held by Codman and were to be paid out of the fund so recovered, the agreement was illegal and that Hadlock was not entitled to any compensation for any services rendered thereunder.

In the case brought by Merrow the defendant Brooks asked the court to rule that if Hadlock made an agreement with the defendant Brooks, or those he represented, to render legal services in the case named, on condition that his compensation was to be paid out of the fund recovered, the agreement was illegal and void, and that if Merrow knew the nature of the agreement, and the order sued on was given and accepted for the purpose of securing to Merrow payment of such compensation or a part thereof, Merrow could not recover.

The court declined to give these requests and gave the following as an instruction applicable to both cases :

"He" (the defendant) "says that the contract which took place was champertous, and therefore illegal, and therefore a void contract, and no contract at all. What is the meaning of a champertous contract? It is this: If in the assumed case

of you going to a lawyer to hire him to take a certain case, you said to him, 'I have n't any money, and unless I win this case I sha'n't have any money to pay you. Will you take this case, charge me either a certain percentage, or such amount as you think best, if you win the case; and if you lose the case, charge me nothing'; that is a champertous contract; that is an illegal contract and is a void contract. There are contracts that look a great deal like it upon the face of it that are not void; that is, are not champertous. It is competent for the parties to say, 'I have no money and I can't pay you until I get the verdict.' If they stop there, if they simply make it a question of the time of payment, it is perfectly competent. It is perfectly competent for the client to say, and the lawyer to agree to it, 'I will pay you, if you are successful, a quarter of what you recover'; if they don't add the further condition, 'Nothing if you don't recover.' Or, in other words, to put it in brief, if they make the payment of any fee at all contingent on the success, that is a champertous contract; but any other kind of a contract they may make; and there are infinite varieties of it, and there are infinite ways in which they may make the size of the fee depend upon the result, and they may make the time of payment dependent upon the result, etc."

In the Merrow case the jury were further instructed as follows:

"The defendant says that the original contract upon which this was based was a champertous, illegal and void contract, and that therefore this contract being made by the parties, and by a man who knew that the contract was champertous, illegal and void, is in itself void. To put it another way: That this contract being based upon a void contract is in itself void; and that I instruct you is true. If you find that the contract in the first place was champertous, as I have described it, that is to say, if you find that it was a contract such as I have described as champertous — and you find that Mr. Merrow knew the facts about the contract, then this contract is itself void. But bear in mind this thought: That Mr. Merrow may not have ever heard the word champertous; Mr. Merrow very likely never did; Mr. Merrow may not have known that it was illegal; the point is, was the contract a contract whereby Mr. Hadlock was to receive

nothing if unsuccessful, and receive a considerable fee if successful, and did Mr. Merrow know of these facts?"

As between an attorney at law and his client it is of the essence of champerty that the attorney, having no previous interest to justify him, upon recovery is to have as his own some part of the thing recovered, or some profit out of it. *Thurston v. Percival*, 1 Pick. 415. *Lathrop v. Amherst Bank*, 9 Met. 489. *Lancy v. Havender*, 146 Mass. 615. But an agreement that one not previously interested and who agrees to prosecute a suit, upon recovery shall have a share of the thing recovered is not for that reason alone champertous. The bargain to be illegal must have the further element that the attorney's services shall not constitute a debt due him from the client, and that his prospective share is to be the only compensation which the attorney shall receive. If in effect he "agreed to look for his compensation to that alone which might be recovered, and thus to make his pay depend upon his success" the bargain is champertous and void. *Ackert v. Barker*, 131 Mass. 436, 438. "Where the right to compensation is not confined to an interest in the thing recovered, but gives a right of action against the party," the agreement is not champertous. *Blaisdell v. Ahern*, 144 Mass. 898, 895. See *Scott v. Harmon*, 109 Mass. 287.

But the contract may be illegal without stipulating in terms that compensation is to be solely by way of an interest in the thing to be recovered. That element of illegality may be inferred from an agreement to prosecute at one's own expense and risk unless successful. *Belding v. Smythe*, 138 Mass. 530. See *Williams v. Fowle*, 132 Mass. 385, 388. As was held in *Blaisdell v. Ahern*, there may be circumstances in which the attorney may lawfully agree to give his services without charge, if the suit should not be successful, and if in case of success, and not otherwise, the attorney's fees are to constitute a debt due from the client and give a right of action against him to recover them, so that the attorney's right is not confined to an interest in the thing recovered, it is immaterial that the avails of the suit or a part of them are pledged as security, or that such avails are the means and the security on which the attorney relies for payment. And as was also said in *Blaisdell v. Ahern*, there may be circumstances in which an agreement by an attorney to give his ser-

vices in the prosecution of a suit with the understanding that they are to be free unless the suit is successful may partake of the worst evils of maintenance.

In view of this statement of the law of champerty as it has been held by this court the instructions requested by the defendant were erroneous. The request in the case brought by the administratrix would require the jury to find champerty at all events if Hadlock's fees were to be contingent upon success and to be paid out of the fund recovered, whereas both of those things might concur and yet if there was a personal obligation upon his employer to pay his compensation his employment would be legal. The request in the other case would require the jury to find champerty at all events if Hadlock agreed to render his services on condition that his compensation was to be paid out of the fund recovered, whereas under many circumstances such a stipulation alone does not constitute champerty.

The exceptions to the refusal to give these requests must therefore be overruled.

The instructions given were colloquial in style, and evidently intended to enable the jury to decide correctly as to the precise controversy as it stood upon the evidence before them, rather than as a full exposition of the law of champerty as between an attorney and his employer. The plaintiff had introduced evidence tending to show that the defendant was acting as solicitor for the children of Henry Gray in the suit of *Codman v. Brooks*, and that upon the death of senior counsel, while the litigation was pending, the defendant had employed Hadlock as his senior counsel; that Hadlock had rendered professional services in the cause, and that after a determination in favor of his clients in it by the Supreme Court of the United States, it had been agreed between the defendant and Hadlock that the compensation of the latter should be the sum of \$8,000. On the other hand the defendant had himself testified that at the time of engaging Hadlock the defendant told him that he, the defendant, had no money, and the heirs had no money to pay lawyers, and that if Hadlock was contented to go into the case contingent upon its success, and to be paid out of the sums recovered, the defendant would like to have him; that Hadlock said he would do so, and that the defendant said to

Hadlock "If I am successful in getting my claim, in getting my fees, you shall be paid what your services are worth." The defendant had testified further that afterwards Hadlock made claim to twenty-five per cent, to which the defendant did not agree; also that both agreed that the amount of compensation was to be contingent and to come out of the fund, Hadlock claiming that it was to be twenty-five per cent, and the defendant that it should be what was reasonable; but that in any event Hadlock and himself were to receive compensation out of the sum recovered, if any. On the same subject Merrow testified that Hadlock told him that the defendant agreed to give him twenty-five per cent of it, if he won it, and that the inducement held out was that he, Hadlock, was to have twenty-five per cent of the amount recovered for the parties whom he represented. Another witness called for the defendant testified that Hadlock said he was going to get \$15,000 based on twenty-five per cent, and that Brooks did not owe him anything, that the heirs owed him.

Upon this situation of the evidence it was not necessary for the court after refusing the defendant's requests to give the jury an exhaustive statement of the law of champerty; and if the instruction given contained no erroneous statement prejudicial to the defendant his general exception to this portion of the charge must be overruled. Construing the instruction in view of the state of the evidence upon which the defendant relied to show champerty in Hadlock's employment, we think it was not erroneous in any point prejudicial to the defendant. On the other hand it left the jury free to find champerty if Hadlock was to receive nothing if unsuccessful and a considerable fee if successful, although they might also find in accordance with the defendant's own testimony that he had himself agreed with Hadlock that if the defendant was successful Hadlock should be paid what his services were worth, that in case of success there was a personal obligation upon the defendant to pay Hadlock the worth of his services. Accordingly the defendant's exceptions to those portions of the charge which dealt with champerty are overruled.

There was evidence tending to show that at some time after Hadlock's original employment he and the defendant agreed

that Hadlock's compensation for services should be the sum of \$8,000. In view of this the defendant asked for an instruction that if the compensation was contingent upon success and was to come out of the fund recovered any subsequent agreement after the services were performed to pay a fixed sum therefor was not binding upon the defendant. The instruction given upon the subject of this request said that if the contract was champertous in the first place the plaintiff could not recover. This covered the request in a way sufficiently favorable to the defendant. But he contends in support of his exception to the whole portion of the charge upon the agreement to pay the fixed sum, first that it was a charge upon the facts, and next that it contained a wrong rule that the burden of proof was upon the defendant to establish the champerty.

Neither of these grounds for the defendant's exception is shown to have been called to the attention of the court at the trial. The first is not supported by an examination of this part of the charge. All that the court did was to call the attention of the jury to the contention of the plaintiff that the original hiring was not champertous, and this was not improper.

Considering the state of the pleadings and the circumstances of the trial we think the exception to the ruling as to the burden of proof must be overruled. Two cases were upon trial together. In one the declaration was upon an order payable upon a contingency drawn by Hadlock and accepted by the defendant, with a second count alleging that after the order was given the defendant for a valuable consideration promised the plaintiff to pay him the amount of the order at all events. In the other case the declaration was in account the debit charge against the defendant being for \$8,000 for professional services rendered by Hadlock in the litigation named "being the compensation for said services agreed upon by the defendant with" him. In that case the answer was a denial of all the plaintiff's allegations, and also a plea of payment, and a plea of Pub. Sts. c. 78, § 1. In the action upon the order, the defendant, besides a denial of all allegations not specifically admitted, admitted that as administrator he employed Hadlock in the litigation mentioned, but denied all personal liability, alleged that the order was accepted upon condition that the defendant was not

to be personally liable, alleged that the services were of no value, that they had been fully paid for, and also set up Pub. Sts. c. 78, § 1.

In neither case did the answer allege that Hadlock's employment was champertous or state any fact from which that result would follow, nor did the plaintiff introduce any evidence upon which it could be contended that Hadlock's employment was champertous. The defendant thus came to the trial admitting that he had employed Hadlock in the litigation and contending among other defences that the plaintiffs could not recover because the agreement for Hadlock's employment was champertous. In substance this defence was a confession and avoidance, and like payment and other such defences must be proved or fail. The fact that the defendant was allowed to attempt to prove it without having set forth in his answer in clear and precise terms the substantive facts upon which he intended to rely in avoidance of the obligation flowing from the admitted employment of Hadlock, gave the defendant no greater right than if his pleadings had conformed to the provisions of Pub. Sts. c. 167, § 20. That there was champerty was a matter which he asserted as a defence and which for that reason he must be required to prove. *Jones v. Ames*, 135 Mass. 431.

In the case brought by Hadlock's administratrix there was an exception to the refusal of the court to allow one of the defendant's witnesses to testify to a conversation had between the witness and the defendant. The bill of exceptions does not state what the conversation was, but if we assume in favor of the defendant that it tended to prove an admission made by Mrs. Hadlock before she was finally made administratrix and when she was not clothed with any representative capacity, such an admission could not be put in evidence. Her subsequent appointment as administratrix did not have the effect by relation to make her declarations previously made competent as admissions, they not being acts of administration. This exception must be overruled. The exception in the same case to the refusal to give three instructions, based upon the contention that Hadlock's employment was upon the credit of the children of Henry Gray and not upon that of the defendant, has not been argued and we treat it as waived.

The defendant is not shown to have disclosed at the trial upon what ground he based his request to direct a verdict in his favor. He now contends that by reason of an order which there was evidence tending to show had been given by Hadlock to his wife and a letter written by the wife to the defendant Hadlock had deprived himself of any right to compensation and could not agree upon its amount. It is enough to say upon this exception that the bill of exceptions does not purport to state all the evidence, and that nothing which it does state would require the court to order a verdict for the defendant.

The order declared on by Merrow in his case was conceded to be on account of the compensation to be received by Hadlock for his services in the case of *Codman v. Brooks*, and is expressed to be payable "when the final distribution is made" of the sum due by virtue of an opinion of the Supreme Court of the United States. It was addressed to "William Gray Brooks, Esq., Administrator of Henry Gray, deceased, and Solicitor of the children of said Henry Gray." The acceptance is in these words: "The foregoing order is hereby accepted. William Gray Brooks, Administrator and Solicitor." The defendant was administrator of the estate of Henry Gray and was also solicitor in the case of *Codman v. Brooks* for the children of Henry Gray, and they were entitled to share in the fund or sum to be distributed mentioned in the order.

The first of the exceptions stated in the bill in this case is to a refusal to rule that the order was not a bill of exchange, but a simple agreement to pay money upon the happening of an uncertain event. The instruction requested was immaterial, and the court was therefore justified in refusing to give it.

The second request stated in the same bill was upon the theory that the order and acceptance were not an undertaking to pay anything beyond what the defendant should receive upon the distribution mentioned in the order in his capacities as administrator and as solicitor for the children of Henry Gray. The court refused so to rule and instructed the jury that by the contract the defendant personally agreed to pay Merrow the sum of \$3,000 when the money should be distributed.

The order is addressed to the defendant by his name with these additions: "Esq., Administrator of Henry Gray, de-

ceased, and Solicitor of the children of said Henry Gray." Its acceptance was by the signature of the defendant, with the addition merely of the words "Administrator and Solicitor." There is no expression of an intention to bind the estate or the children. There was no evidence tending to show that the children knew of the order or authorized the defendant to accept it.

The defendant had as solicitor no power to bind his clients by the acceptance of an order, and as administrator he had no power to bind the estate by such an acceptance. The form of acceptance does not purport to bind either the children or the estate, and there was no evidence that the defendant in fact intended to bind either the children or the estate. These circumstances distinguish the case from that of *Grafton National Bank v. Wing*, 172 Mass. 513, in which the executor purported to bind the estate by the form of his indorsement, and claimed that he had the right to bind it, and so was held not to have bound himself personally. We think therefore that the order and acceptance must be construed to bind the defendant personally, and that upon the evidence the court was right in so instructing the jury. The facts that the defendant was administrator of the estate and solicitor for the children, and that there was no money of the estate or of the children in prospect with which to pay the order except what was to be received in the litigation mentioned did not create an ambiguity which made it necessary to leave the meaning of the contract to the jury. See *Shoe & Leather National Bank v. Dix*, 123 Mass. 148.

The third request in the Merrow case brought up the subject of champerty in the employment of Hadlock, and of the effect of that champerty upon the validity of the order. The instructions as to whether Hadlock's employment was or was not champertous have been dealt with in considering the case brought by his administratrix. After those instructions the jury were told in substance that if Hadlock's employment was champertous, and this was known to Merrow, the contract made on the order and acceptance was void. This was sufficiently favorable to the defendant. The ruling in this connection that the burden was upon the defendant to establish this defence of illegality in

the order and the acceptance was right, for the reasons stated in connection with the similar ruling in the case of the administratrix.

It appeared at the trial that after the giving of the order a payment had been made by six of the children of Henry Gray upon the settlement of suits brought by the defendant against them, in which suits the defendant sought to recover of them severally one tenth of the fees of Hadlock for his services in the case of *Codman v. Brooks*, as well as for one tenth of the defendant's own services in that litigation. These payments were made in May, 1898, and amounted to \$5,500. Before the settlement the children insisted upon a release from the administratrix of the estate of Hadlock, which was given upon the payment of \$1,000, part of the \$5,500, to Sampson the attorney for the administratrix, who was then also the attorney for Merrow for the collection of the order now in suit. Merrow knew nothing of the settlement or the payment of the \$1,000 to Sampson, and received no part of the money.

In this connection the defendant asked the court to instruct the jury that if when Sampson received the \$1,000 he was Merrow's attorney to collect the order, and knew that the order was drawn on the fees to become due to Hadlock, the \$1,000 should be credited on the order. The court refused this instruction, and it being conceded that there was no evidence that Merrow knew that the payment was to be made, nor that he assented thereto, instructed the jury that the \$1,000 could not be credited upon the order. The refusal to instruct and the instruction were excepted to by the defendant. These exceptions must be overruled. Although Sampson was an attorney for Merrow the payment was not made to him in that capacity, but to him as attorney for the administratrix, who as well as Merrow had a right in the amount due on account of Hadlock's services. Sampson could not apply the payment made to him as attorney of the administratrix to his other client, nor was the administratrix bound to the defendant to see that the order accepted by him was paid.

The order given by Hadlock to Merrow was to pay "when the final distribution is made of the sum due by virtue of an opinion of the Supreme Court of the United States, and in

accordance with a mandate directed to the Supreme Judicial Court of the Commonwealth of Massachusetts within and for the county of Suffolk in the case of William Gray Brooks, *Admr., et al., v. Robert Codman, Admr., et al.*" The order was dated June 2, 1896, which was after the decision of *Brooks v. Codman*, 162 U. S. 439, in pursuance of which the mandate mentioned in the order was given and before the final decision of the case reported in 167 Mass. 499. By that final decision, rendered on February 23, 1897, it was ordered that the money in the hands of Codman for distribution be divided into twenty-three equal shares "of which one will be given to each of the surviving grandchildren and one to the children of each of the deceased grandchildren."

Hadlock and the defendant were concerned only with the ten of the twenty-three shares, which by force of the decision and order were to be given to the ten children of Henry Gray for whom Hadlock and the defendant acted in the Codman suit. When the Merrow action was commenced eight of the ten shares had been paid over in accordance with the final decision, but the two shares due to Charles R. and Frederick W. Gray, children of Henry Gray, were then and also at the date of the trial still held by Codman. It appeared that after the giving of the order to Merrow the defendant on July 7, 1896, had procured from each of these two of his clients an assignment of the clients' share of the fund in litigation. It also appeared from the defendant's testimony that in July, 1896, Charles R. Gray was over seventy-four years of age and Frederick W. Gray over seventy-one, and that when they made the assignments and for a long time before both lived in an asylum for the cure of mental trouble, and that after the date of the assignments guardians were appointed for each. It also appeared that in July, 1897, Codman had a decree of distribution ordering payment, that the defendant had notified Codman of the two assignments and that the defendant would claim those two shares and would bring suit against Codman for them, and that such suit had been brought by the defendant and a suit brought by the guardian to dismiss that suit, and that also suits were pending to declare the assignments invalid, and that the two shares were tied up by litigation.

Upon this evidence the defendant requested the court to instruct the jury, as follows :

“ ‘Final distribution,’ mentioned in said order, means distribution of the entire sum due to all the ten children of Henry Gray, and the plaintiff cannot recover unless he proves that such a distribution has been made.” The court refused and instructed the jury that if the only reason why the distribution had not been completed was the act of the defendant himself the plaintiff could recover.

We do not give to the order the construction for which the defendant contends. When the order was drawn Hadlock, the defendant and Merrow all knew that the right of the children of Henry Gray to share in the fund, the distribution of which was in litigation in the case of *Codman v. Brooks*, was established by the decision of the Supreme Court of the United States, and that their proportions of the fund would be determined by a decree of distribution to be entered in the cause in accordance with the mandate referred to in the order. The words “the sum due by virtue of an opinion,” etc., the “final distribution” of which sum is made by the language of the order its time of payment, is not the sum coming to the clients of Hadlock and the defendant but the whole fund appropriated by Congress for the losses of William Gray the elder, the distribution of which fund was the subject of the suit mentioned in the order. We think that the time of the final entry of a decree or order of distribution of that fund was the time of payment stipulated in the order, and not the time when the last dollar of the fund should actually come to the hands of a child of Henry Gray. The stipulated time of payment therefore arrived at the latest in July, 1897, when Codman obtained his final decree of distribution, long before the bringing of the Merrow suit in June, 1898. Under our construction of the order the instruction requested was wrong, and that given did the defendant no harm because the time stipulated for payment in the order had arrived before the bringing of the suit. We intimate no opinion as to the correctness of the instruction given.

Finally the defendant excepted to a refusal to order a verdict in his favor. He has asserted in his brief that such an order

should have been given but has not supported it by any argument. There was a count upon a promise to pay the order at all events and evidence in support of such a promise, and of a consideration therefor moving from Merrow. For this and other reasons such a direction could not have been given.

Exceptions overruled.

CORNELIA PHELPS vs. BENJAMIN FITCH & others.

Suffolk. December 3, 1900. — April 3, 1901.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

An agreement of compromise, made between the sole residuary legatee and executor under a contested will, of the first part, and the sole next of kin and certain family friends and servants of the testatrix claiming under former wills, of the second part, provided, that the will should be admitted to probate, and that the residue should be divided equally between the party of the first part and the parties of the second part, and that the party of the first part should "at the expiration of thirty days after the final allowance and probate of said will . . . convey, assign and transfer by proper instruments in writing . . . one half of all his interest in and to said estate, as residuary devisee and legatee under said will, to and among said parties of the second part to be held by them respectively in the same manner and in the same shares or proportions as the said one half of the said residue is hereinafter stipulated to be paid to them respectively." The provision for the distribution of half of the residue among the parties of the second part was on the basis that such one half would amount to \$30,000. Payments amounting to \$16,500 were to be made to the parties of the second part other than the next of kin, and the next of kin was to be paid \$13,500 "and also the excess of said one half said rest, residue and remainder over and above thirty thousand dollars." There was also the following provision: "If, however, said one half of said rest, residue and remainder shall not amount to thirty thousand dollars, then, and in that event, each and every payment hereinbefore to be made out of said one half, shall be abated *pro rata*." The will having been allowed in accordance with the agreement, the executor, party of the first part, two years and a half later filed his final account by which it appeared that one half the net residue was more than \$40,000, and that the property of the estate had increased in value more than \$10,000 since the allowance of the will. It appeared, however, that there had been no increase in value after the expiration of two years from the time of the executor's appointment. *Held*, that by the true construction of the agreement of compromise the next of kin was entitled to the balance of one half the net residue of the estate after paying to the other parties of the second part the sums specified in the agreement to be paid to them, that the purpose of the conveyance to be made by the residuary legatee thirty days after the allowance of the will was to give to the parties of the sec-

ond part one half of his interest as residuary legatee and the right to receive their respective shares thereof when the time for distribution should arrive, and that the executor was entitled to the ordinary period of two years in which to pay the debts and legacies and ascertain the residuum, and, the increase in the value of the property all having occurred within that time, the parties of the second part other than the next of kin had no interest in it, and that the provision in the agreement, that in case one half the net residue should turn out to be less than \$30,000 all the payments to the parties of the second part should abate ratably, did not affect the construction of the express provision, that in case one half turned out to be greater than \$30,000 the next of kin was to have "the excess." *Held, also*, that the parties of the second part other than the next of kin were not entitled to interest after the expiration of one year from the death of the testatrix on the sums to be paid to them under the agreement, since these sums were paid not as legacies but as part of the residue, and the money was not wrongfully detained.

BILL IN EQUITY by the sole heir at law and next of kin of Elizabeth G. Phelps, deceased, to enforce an agreement of compromise relating to the will of said Elizabeth, under which the defendant Fitch was executor and residuary legatee, filed September 2, 1899.

The case came on to be heard upon a master's report, before *Knowlton, J.*, who, at the request of the parties, reserved the case for the consideration of the full court, such decree to be entered as law and justice might require.

The allegations of the bill were as follows:

1. That the plaintiff, Cornelia Phelps, an insane person bringing her bill by Herbert L. Harding, her guardian, is the sole heir at law and next of kin of the late Elizabeth G. Phelps, who died on October 15, 1896, leaving an estate of about \$100,000 in value.

2. That upon the death of Elizabeth G. Phelps, the defendant Benjamin Fitch offered for probate in the Probate Court for the county of Suffolk an instrument in writing purporting to be the will of the said Elizabeth, by which the greater part of her estate was given to Fitch as residuary legatee and devisee, and in which Fitch was named as executor.

3. That the plaintiff was not then under guardianship, and the allowance of the will was contested by her through John S. Patton, one of the defendants, who was then acting as her attorney. [The will was also contested by the defendant John B. Manning and one Jane Dignan, claiming under former wills of the deceased and also represented by Patton.]

4. That said contest was settled and disposed of by an agreement of compromise in writing, dated January 6, 1897, between Fitch, as party of the first part, and the plaintiff, the defendant Patton and others, parties of the second part, a copy of which was annexed to and made part of the bill and marked A.

5. That by this agreement it was provided in substance that the will should be allowed; that Fitch should be appointed executor thereof, and that the residue of the estate should be divided into two equal portions, one portion to be given to Fitch in settlement of all his claims under the will, and the other portion to be given to the plaintiff, after certain specific payments had been made from said second portion to the various other parties named in the agreement.

6. That the parties to whom specific amounts were to be paid, under the agreement, out of the second portion of the rest and residue were, with the exception of Patton, family friends or servants of Elizabeth G. Phelps, and the payment to Patton of the sum of \$6,000 provided for by the agreement was in payment of his fees as counsel for the plaintiff in the matter of the contest of the will.

7. That upon the execution of the agreement of compromise and in pursuance thereof, the plaintiff withdrew her opposition to the will, which was thereupon, on January 21, 1897, duly allowed, and Fitch was on the same day appointed executor thereof, and duly qualified as such executor.

8. That on November 9, 1897, the plaintiff was adjudged insane, and was placed under the guardianship of Herbert L. Harding aforesaid, by decree of the Probate Court for the county of Middlesex.

9. That Fitch filed in the Probate Court his first account, and also his second and final account as executor of Elizabeth G. Phelps, and it appeared by the last account that the rest and residue of her estate, within the meaning of the agreement of compromise, amounted to \$83,957.88, and twelve shares of stock of the Michigan Central Railroad Company, and accordingly one half of the rest and residue largely exceeded the sum of thirty thousand dollars [named in the agreement of compromise].

10. That the plaintiff and Patton appealed from the decree of

the Probate Court allowing the account; and thereupon Fitch, in consideration of the withdrawal of their appeals by the plaintiff and Patton, paid to the plaintiff \$23,834.94, to Patton \$6,000, and to other persons named in the agreement as follows: To Kate Lincoln \$1,000; to Maggie Jones \$2,500; to John B. Manning \$1,000; to Mary M. Blake \$1,000; and to the estate of Jane Dignan, late of New York, deceased, \$640, these payments being in full satisfaction of all amounts due the parties, except the plaintiff, under the agreement; but retained in his own hands and possession the sum of \$6,000, and also six shares of the capital stock of the Michigan Central Railroad Company, as the balance of the sum due the parties of the second part from the second portion of the rest and residue under the agreement.

11. That Jane Dignan was alive at the time the agreement of compromise was made, and was one of the parties of the second part thereof, and was entitled thereunder to \$40 a month for life, to be paid out of the interest and principal of a sum of \$4,000, the principal, or what remained thereof, to go to the plaintiff upon the decease of Dignan. That Dignan is now dead, and her estate has received \$640 in full satisfaction of her life interest, and therefore has no further interest in or under the agreement of compromise.

12. That one Harriet M. Whitcomb was also one of the parties of the second part to the agreement of compromise, but that her interest was confined solely to the furniture, pictures, jewelry, china and family bric-a-brac of the late Elizabeth G. Phelps, and that she has received these, and is no longer interested in the agreement.

The material portions of the agreement of compromise above referred to as marked A are as follows:

“Now, therefore, in consideration of the waiver of all objections to the allowance of said will dated January 25th, 1894, by all the parties hereto of the second part, and of the mutual agreements and undertakings herein set forth, and for the purpose of compromising, adjusting and settling the respective claims of all the parties hereto to a share in the estate of said Elizabeth G. Phelps, it is hereby agreed by and between said Benjamin Fitch, party of the first part, and John B. Manning formerly of said Boston, now of New York, Harriet M. Whitcomb, Maggie Jones,

John S. Patton, Jane Dignan and Kate Lincoln, all of said Boston, Mary M. Blake of Philadelphia, and said Cornelia Phelps, who constitute the parties of the second part, that said instrument dated January 25th, 1894, shall be proved and allowed as and for the last will of said Elizabeth G. Phelps; that said Fitch shall be appointed executor thereof; that said Fitch shall at the expiration of thirty days after the final allowance and probate of said will dated January 25th, 1894, convey, assign and transfer by proper instruments in writing duly executed and acknowledged, free from all right of dower and from all encumbrances made or suffered by him, one half of all his interest in and to said estate, as residuary devisee and legatee under said will, to and among said parties of the second part to be held by them respectively in the same manner and in the same shares or proportions as the said one half of the said residue is hereinafter stipulated to be paid to them respectively; and that after the payment according to law and said will, of all funeral charges, the cost of a suitable headstone, charges of administration and all debts against said estate, and all specific legacies named in said will, (including the legacy tax thereon), one half of all the rest, residue and remainder of said estate shall be paid to said Fitch, his heirs, executors, administrators and assigns, under the residuary clause in said will so allowed as aforesaid, in full satisfaction of all his claims against said estate, except for services rendered and disbursements made by him as executor of said will, and the remaining one half of all said rest, residue and remainder, (to be conveyed, assigned, and transferred by him as aforesaid), shall be paid to the parties of the second part, their respective heirs, executors, administrators and assigns, as follows: to said John B. Manning, one thousand dollars; to said Harriet M. Whitcomb, so much of the household furniture, pictures, ornaments, jewelry, china, bric-a-brac and other articles of personal property now in the house No. 49 Allen Street in said Boston, and belonging to said estate, as she may select, not exceeding at its appraised value, one thousand dollars, to be by her distributed to and among the friends of said Elizabeth G. Phelps, as she, the said Harriet M. Whitcomb, may designate; to said Maggie Jones, twenty-five hundred dollars; to said John S. Patton four thousand dollars in trust to pay to said Jane Dignan in equal

monthly instalments during her natural life the income thereof and so much of the principal as shall both interest and principal together amount to forty dollars per month, said monthly payments to date from October 13th, 1896; and upon her decease, to pay the balance of said principal then remaining, to said Cornelia Phelps, her heirs, executors, administrators and assigns, free from all trusts; to said Kate Lincoln, one thousand dollars; to said Mary M. Blake, one thousand dollars; to said John S. Patton, six thousand dollars; and to said Cornelia Phelps, thirteen thousand and five hundred dollars, and the difference between one thousand dollars and the value of the articles which said Harriet M. Whitcomb may select as above provided, in case such value shall at their appraisal, be less than one thousand dollars, and also the excess of said one half said rest, residue and remainder over and above thirty thousand dollars.

"If, however, said one half of said rest, residue and remainder shall not amount to thirty thousand dollars, then, and in that event, each and every payment hereinbefore to be made out of said one half, shall be abated *pro rata*."

The justice made the following findings of fact:

"I find all the averments of the plaintiff's bill to and including the eighth paragraph to be true. I find also the eleventh and twelfth paragraphs to be true. Fitch, executor, filed in the probate court his first, and also his second and final, account as executor of the will of Elizabeth G. Phelps, by which it appeared that the rest and residue of the estate within the meaning of agreement A was a sum differing not much from the sum stated in the ninth paragraph of the bill, with twelve shares of stock as therein stated, and one half of said rest and residue largely exceeded thirty thousand dollars. Appeals were taken from the decree of the probate court allowing this final account, as stated in the tenth paragraph of the bill, and thereupon the parties settled their dispute in regard to the amount to be accounted for by Fitch, and the appeals were withdrawn, and it was agreed by all the parties that the amount to be accounted for on July 18, 1899, as one half of said rest and residue was \$41,978.94 in money, together with six shares of the capital stock of the Michigan Central Railroad Company, after the delivery to Harriet M. Whitcomb of the furniture and other articles to

which she was entitled. Thereupon on that day he made payments as alleged in the tenth paragraph of the plaintiff's bill, including the payments previously made to the estate of Jane Dignan, amounting in all to \$35,978.94, and retained in his hands for future payments to such of said parties as should be entitled thereto, the sum of \$6,000 and six shares of the stock of the Michigan Central Railroad Company. Afterwards he paid into court said sum of \$6,000 with \$40 interest accrued thereon.

"The income and dividends received by said executor from the estate from February 21, 1897, to May 12, 1899, exceeded \$5,000, and the net increase in value of said estate during the same time by reason of appreciation in the market value of the securities belonging to it, and gains on sale of the same, accounted for by the executor, exceeded \$10,000.

"I found that the parties to this suit other than Fitch had vested interests in this rest and residue on February 21, 1897, in proportions thereafter to be determined according to the provisions of the agreement in regard to payment. I found that the agreement contemplated the making of these payments at the expiration of two years from the appointment of the executor, viz., on February 21, 1899, and that the proportionate shares of the parties would depend on the amount of money to be divided among them at that time. There was evidence that this amount was not the same as the amount held by the executor on July 18, 1899, when he made the payments, and I appointed a master to ascertain the amount as of the earlier date, and to determine the shares of the parties."

The will of Elizabeth G. Phelps contained the following: "I give and bequeath to my cousin Cornelia Phelps of Boston the sum of eight thousand dollars to be paid as soon as possible after my death.

"I give and bequeath to the following named societies, corporations and individuals the sums named after each, namely:

"To the Children's Mission to the Children of the Destitute in the City of Boston the sum of five thousand dollars.

"To the 'Benevolent Fraternity of Churches,' the sum of one thousand dollars.

"To my faithful servant, Jane Dignan, the sum of one thou-

sand dollars. To Miss Maggie Jones, my other servant, the sum of two hundred dollars. To my dear friend, Mrs. Susan M. Manning, the sum of two thousand dollars. To Louisa A. daughter of my deceased friend Katie A. Burbank, the sum of one thousand dollars. To my friend Hattie A. Whitcomb the sum of one thousand dollars. To Mr. George O. Manning of Baltimore in the State of Maryland, the sum of one thousand dollars. The portrait of my deceased brother now in the parlor of my residence on Allen Street, Boston, I give to said Hattie A. Whitcomb.

"All the rest, residue and remainder of my estate real, personal or mixed or wherever situated or found, I give, devise and bequeath to Benjamin Fitch of said Boston. To hold to said Fitch, and to his heirs and assigns forever.

"I nominate and appoint the said Benjamin Fitch to be the executor of this my will and request that he be exempt from giving surety on his official bond."

In the argument for the plaintiff it was pointed out that the agreement of compromise began by an assumption that the residue was \$60,000, and divided exactly half of that sum among the parties of the second part, as follows:

| | |
|--|---------|
| To John B. Manning | \$1,000 |
| To Harriet M. Whitcomb, furniture, etc., up to | 1,000 |
| To Maggie Jones | 2,500 |
| To John S. Patton, in trust for Dignan for life (with the remainder to the plaintiff) | 4,000 |
| To Kate Lincoln | 1,000 |
| To Mary M. Blake | 1,000 |
| To John S. Patton | 6,000 |
| To Cornelia Phelps, the plaintiff | 13,500 |

| | |
|--|----------|
| Total (<i>i. e.</i> , one half residue) | \$30,000 |
| Equal amount to Fitch | 30,000 |

| | |
|---|----------|
| Total (<i>i. e.</i> , assumed value of the whole residue) | \$60,000 |
|---|----------|

The agreement, it was contended, then expressly provided that, if the residue exceeded this assumed value, "the excess of

said one-half said rest, residue and remainder over and above \$30,000" should go to the plaintiff.

J. S. Patton, for the defendants.

G. Hay, Jr., (*H. L. Harding* with him,) for the plaintiff.

LOBING, J. We are of opinion that by the true construction of the agreement of compromise the plaintiff is entitled to the balance of one half of the net residue of the estate left after paying to the defendants, other than the defendant Fitch, the sums specified in the agreement as the sums to be paid to them. For convenience we shall hereafter speak of the defendants other than Fitch as the defendants.

The agreement in question is a compromise of a controversy as to the validity of the will under which Fitch was residuary legatee; it provided that that will should be admitted to probate, and that Fitch's residue should be divided equally between Fitch, party of the first part, and the parties of the second part, who were the plaintiff (the sole heir and next of kin of the testatrix) and the defendants, who apparently had claims as creditors or legatees under previous wills. The agreement was drawn on the basis that one half of the net residue would amount to \$30,000; it provided that certain specified sums should be paid to the defendants, which sums, including the personal property to be taken by Harriet M. Whitcomb, amounted to \$16,500; it then provided that \$13,500 (which it is apparent is found by deducting from \$30,000 the \$16,500 just mentioned) should be paid to the plaintiff, "and also the excess of said one-half said rest, residue and remainder over and above thirty thousand dollars." The conclusion that the plaintiff was to have all the increase in valuation of the estate in case it turned out that one half of the net residue of it was more than \$30,000 is borne out by several facts. In the first place, the plaintiff was "the only heir at law and next of kin" of the testatrix, while the defendants, who with the plaintiff constituted all the parties of the second part, for whom one half of the net residue was set aside in the agreement of compromise, were "family friends or servants" of the testatrix, that is to say, persons who had no claim to share in the estate proportionately with others. Moreover it directly appears that the \$6,000 to be paid to the defendant Patton were to be paid for services

rendered by him as an attorney at law; and it also appears that John B. Manning and Jane Dignan were persons "claiming under prior wills of said deceased." Again, it is expressly provided that, in case articles selected by Harriet M. Whitcomb did not amount, at their appraised valuation, to \$1,000, the balance should go to the plaintiff; and so again, in case the \$4,000 paid to the defendant Patton in trust to pay Jane Dignan \$40 a month during her natural life was not needed in whole for that purpose, "the balance of said principal" was to be paid to the plaintiff.

It is apparent, therefore, that the agreement of compromise undertook to provide for the distribution of this half of the residue on the assumption that it would amount to \$30,000; acting on that assumption, it provided that specific sums were to be paid to the plaintiff and to the defendants, the amount to be paid to the plaintiff being the balance ascertained by deducting from \$30,000 the amount found by adding together the sums to be paid to the defendants. It then provided for the contingency of this half amounting to more than \$30,000, and the provision made was "the excess of said one half said rest, residue and remainder over and above thirty thousand dollars" should be paid to the plaintiff. It is apparent that all the interest the defendants had under the agreement of compromise was to be severally paid the respective sums mentioned therein, at the time when the payments should be due.

The defendants contend that the conveyance of one half the residue of the estate to be made by the residuary legatee, on the expiration of the time for an appeal from the decree of the Probate Court allowing the will, made them (the defendants) together with the plaintiff tenants in common of one half the residue as it then existed, and that they are entitled to share in the increase of the fund in the proportions in which they then held the fund as tenants in common; and that unless this meaning is given to this conveyance it is a nugatory act. But we are of opinion that whatever the increase of the value of the property during the time that it was to be held by the executor for the settlement of the estate might be, they were entitled to receive only the sum mentioned in the contract at the time when their share of the residue was to be paid over.

It is apparent that the purpose of the conveyance, which by the terms of the agreement of compromise was to be made by the residuary legatee in the case at bar on the expiration of the time for an appeal from the decree of the Probate Court allowing the will, was to give to the parties of the second part one half the net residue, the whole of which vested in Fitch as residuary legatee by the allowance of the will; and that this was the whole effect of this transfer to the plaintiff and to the defendants "to be held by them respectively in the same manner and in the same shares or proportions as the said one half of the said residue is hereinafter stipulated to be paid to them respectively"; it gave to the plaintiff and the defendants the right to their share of the cash or the securities constituting the residue of the estate when the time for distribution should arrive. It follows that all the interest the defendants had under the agreement and under the conveyance of one half the net residue provided for in the agreement, was to be paid the several sums mentioned, when the time for distribution of the residue came, and that time was not until the executor in the regular course of proceedings had an opportunity to pay the debts and specific legacies and to ascertain the residuum. This ordinarily would be at the expiration of two years from the time of his appointment. It appears that there was no increase in value of the property in the hands of Fitch after the expiration of two years. The question whether if there had been such an increase the defendants have such an interest in the property as to entitle them to share in it, does not arise in the case, and it is unnecessary to consider it.

The defendants also contend that the provision that in case one half the net residue turned out to be less than the \$30,000, "each and every payment hereinbefore to be made out of said one half shall be abated *pro rata*," shows that the construction stated above is not correct. We do not think so, but on the contrary we think that that provision represents the trade which was made to cover that contingency, and does not affect the construction which we have given to the express provision that the plaintiff was to have the "excess," in case one half turned out to be greater than \$30,000.

The defendants' contention that they are entitled to interest

on the sums to be paid to them remains to be disposed of. They contend that they are entitled to interest on these sums on the same principle on which interest is paid on a legacy. But interest is paid on a legacy after the expiration of one year from the decease of the testator, as an incident of the legacy, not for wrongful detention of money due. *Kent v. Dunham*, 106 Mass. 586. *Ogden v. Pattee*, 149 Mass. 82. *Welch v. Adams*, 152 Mass. 74. In this case the sums to be paid to the defendants were not sums paid as legacies but were sums paid as part of the residue; there can be no interest in a part of a residue on the expiration of one year, and interest can be recovered in the case at bar only on the ground that the money was wrongfully detained by the executor, and is to be paid by him out of his own property. In this case the money was not wrongfully detained. When the time for distribution of the residue of this estate arrived, these defendants did not demand payment of the sums due to them; their contention at that time was that they were interested proportionately with the plaintiff in one half of the residue, and they entered into a contest with the executor as to what the amount of one half of the residue was. That contest was ended on July 18, and on that day what was due to the defendants was paid or transferred to them.

A decree should be entered declaring that the plaintiff is entitled to the fund in court, and directing the defendant Fitch to transfer to her six shares in the capital stock of the Michigan Central Railroad Company.

So ordered.

PEOPLE'S SAVINGS BANK *vs.* FRANK W. WUNDERLICH
& another.

Middlesex. December 4, 5, 1900. — April 3, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER,
HAMMOND, & LORING, JJ.

An advertisement of a sale of land under a power of sale in a mortgage described four lots which originally had been included in the mortgage but the most valuable of which had been released therefrom on payment of three fifths of the mortgage debt. The mortgagee's attorney who published the advertisement did not

know of the release. At the time of the sale the released lot had a house upon it worth more than the amount of the original mortgage debt. The other lots which remained subject to the mortgage were vacant. The mortgage provided that in case of default the mortgagee might "sell the granted premises or such portion thereof as may remain subject to this mortgage in case of any partial release hereof." The sale took place at the time advertised. The mortgagee's attorney having discovered his mistake, the auctioneer just before the sale announced to those present that the lot with the house on it had been released, and proceeded to sell the three vacant lots. *Held*, that the sale was not a valid execution of the power given by the mortgage, as the real estate advertised was substantially different from what the mortgagee sold or had a right to sell.

BILL IN EQUITY by the assignee of a second mortgage, to redeem certain land in Arlington from a sale purporting to have been made under a power of sale in a first mortgage thereon, filed February 15, 1899.

The case was heard in the Superior Court on agreed facts and certain oral evidence by *Sheldon, J.*, who made a decree, declaring the plaintiff entitled to redeem the lots described in his bill from the first mortgage, and referring the case to a master to state the account. From this decree the defendant Frank W. Wunderlich, who as assignee of the first mortgage had made the sale in question, and the defendant William Craig, the purchaser at such sale, both appealed.

It appeared from the agreed facts, that the land sought to be redeemed consisted of three lots numbered respectively 27, 28 and 32 on a certain plan. The first mortgage, dated December 2, 1891, conveyed four lots consisting of the three lots already named and another lot numbered 24. The amount originally secured by this mortgage was \$2,000, but on March 18, 1892, a part payment of \$1,200 was made and in consideration thereof the mortgagee released lot 24 from the mortgage, leaving the other three lots as security for the balance of \$800 still due.

On June 13, 1894, the defendant Wunderlich acquired the first mortgage by assignment. He was then and has since continued to be in the employ of the defendant Craig. In June, 1894, there was on lot 24 a house worth about \$2,500. Lots 27, 28 and 32 were vacant and have remained so.

The first mortgage contained a power of sale with a provision, that in case of default the mortgagee or his assigns might "sell the granted premises or such portion thereof as may remain subject to this mortgage in case of any partial release hereof."

On or about June 25, 1894, the first mortgage being overdue, the defendant Wunderlich instructed D. D. Corcoran, Esquire, an attorney at law, to foreclose the mortgage. Mr. Corcoran, not knowing of the release of lot 24 from the operation of the mortgage, advertised the premises described in the mortgage for sale on July 26, 1894. After Mr. Corcoran had published this notice he was informed that lot 24 had been released from the mortgage, and at the sale of the premises on July 26, 1894, the auctioneer just before the sale said to those present that lot 24 had been released, and that he should only sell lots 27, 28 and 32. He thereupon sold the last named lots to William Craig for the sum of \$1,000, Craig, by his agent, Wunderlich, being the highest bidder at the sale, and within thirty days from the time of the sale a deed of the lots was executed and delivered by the defendant Wunderlich to the defendant Craig. There were present at the sale only the auctioneer, Mr. Corcoran and the defendant Wunderlich.

The judge in making the decree appealed from added the following report of facts :

" In addition to the agreed facts, I find that there was no fraud on the part of either of the defendants in the attempted foreclosure of July, 1894 ; that neither defendant knew of the plaintiff's second mortgage on the lots in question ; that the price realized at the foreclosure sale could not be said to have been an inadequate one, though it may have been a little under the full market value of the property ; and that the defendant Wunderlich began a new foreclosure in January, 1899, as averred in the plaintiff's bill for the sole reason that his grantee's title had on an examination been deemed unsatisfactory by a lawyer, and that he abandoned these proceedings on the filing of the plaintiff's bill. It did not appear when the plaintiff learned of the foreclosure of July, 1894. The plaintiff never paid or offered to pay to the defendant Wunderlich any part of the principal or interest on the mortgage held by him. The plaintiff bank in its entry of September, 1895, to foreclose its mortgage, was represented by Sanford H. Dudley, a lawyer residing in Cambridge and doing business in Boston in this Commonwealth. The plaintiff did nothing to enforce its alleged rights until the filing of this bill in February, 1899. There has been no change in

the title to the property since the foreclosure sale of July, 1894. No explanation is made of the plaintiff's delay in seeking redress, except that it filed its bill on learning that the defendant Wunderlich had begun a new foreclosure in January, 1899."

The case was argued at the bar in December, 1900, and afterwards was submitted on briefs to all the justices.

W. B. Orcutt & W. L. Baker, for the defendants.

J. A. Bailey, Jr., for the plaintiff.

LORING, J. The mortgage in question provided that in case of default the mortgagee might "sell the granted premises or such portion thereof as may remain subject to this mortgage in case of any partial release hereof." There was a partial release of one of the four lots originally covered by the mortgage, on payment of \$1,200, leaving \$800 of the mortgage debt due. Under the circumstances existing at the date of the advertisement under which the sale in question took place, all the land, over which the assignee of the mortgage had a power of sale, was the remaining three lots; but by mistake he advertised for sale all four lots. At the time of the sale the lot (which had been released from the lien of the mortgage two years and a half before) had a house on it worth \$2,500, and the remaining three lots of land were vacant. Apparently this house had not been built when this lot was released. The sum paid for the release of the one lot released was three fifths of the mortgage debt, and the price which the remaining three lots brought at the auction sale in question was one half the mortgage debt. This is a case, therefore, where the mortgagee has included in the advertisement a lot over which he had no power of sale, in addition to three lots covered by the mortgage; further the lot, wrongfully included in the advertisement, when vacant, was worth more than the three lots rightfully included; and in addition it had on it a house worth more than three times the amount then due on the mortgage, while the three lots covered by the mortgage were vacant land. The natural effect of such an advertisement would be to induce the belief in those, who saw it, that at the sale either the lot, on which the house was, would be put up first and would bring more than the amount of the mortgage, or that, as is generally the case, the four lots would be put up in one parcel. Therefore the class of custom-

ers, who are looking for vacant lots rather than for a dwelling, naturally would not care to attend the sale, and would not do so. The statement of the auctioneer would not help this, as there was no postponement and no new notice.

The real estate advertised was substantially different from what the mortgagee sold or had a right to sell, and the sale was not a valid execution of the power given him. *Fenner v. Tucker*, 6 R. I. 551.

Since the advertisement included all the land originally covered by the mortgage, while by the terms of the mortgage all the land, over which the mortgagee then had a power of sale, was the land remaining after the partial release, the defendants can get no support from cases like *Colcord v. Bettinson*, 131 Mass. 233, and *Bell Silver & Copper Mining Co. v. First National Bank of Butte*, 156 U. S. 470, where the advertisement follows the mortgage; but these cases make against them. Neither does the case of *Pryor v. Baker*, 133 Mass. 459, support this contention; in that case the advertisement described what the defendant had a right to sell, what was in fact sold, and nothing more.

The land was bought by the defendant "Craig by his agent Wunderlich," who was the assignee of the mortgage and who was at the time, and since has continued, in the employ of Craig. On this evidence the court had a right to treat Craig as having no greater rights than Wunderlich. No new rights having intervened since the sale, the bill is well brought within six years after it took place.

Decree affirmed.

CHARLES M. TILLINGHAST & another, trustees, vs. NORTH
END SAVINGS BANK.

Suffolk. January 18, 1901. — April 3, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Upon a first mortgage to secure a building loan of \$20,000 a bank advanced \$15,000 and retained \$5,000 under an agreement with the mortgagor "until the said building shall be in such progress to completion that the mortgagee shall deem it safe to advance said balance." A second mortgagee acquired the equity in the property by foreclosure, and brought a bill to redeem from the first mortgage. The bank had paid out the whole of the \$5,000 retained by it upon orders from the mortgagor, leaving the amount of \$450 due to it for interest. It was contended by the second mortgagee that the bank ought to have applied the amount of \$450 to the payment of this interest from the \$5,000 retained by it, and could not require that sum to be paid by the second mortgagee in redeeming from the bank's mortgage. *Held*, that the bank was not bound thus to apply the money in its hands, that the \$5,000 was not additional security but was part of the sum lent, retained to ensure the completion of the building, and that the rule, requiring a prior encumbrancer with two securities first to resort to that on which the subsequent encumbrancer has no lien, did not apply. Whether the bank lawfully could have set off the sum of \$450 against the interest due it without the consent of the mortgagor, *quære*.

MORTON, J. This is a bill to redeem. The sole question is whether the sum of \$450 should have been applied by the bank to the payment of interest due it on the mortgage. It appears that in August, 1892, one Black and his wife made a mortgage for \$20,000 to the defendant bank. At the time the mortgage was made there was a building in the process of erection on the premises and the loan was what is termed a building loan. Of the sum lent \$15,000 was advanced at once to the Blacks, and the balance of \$5,000 was retained by the bank under an agreement with them "until the said building shall be in such progress to completion that the mortgagee shall deem it safe to advance said balance." The \$450 is a part of the \$5,000 thus retained. Ten days after this mortgage was made a second mortgage was made by the Blacks subject to the first mortgage of \$20,000. This mortgage has been foreclosed and the plaintiffs have succeeded to the title. The defendant had notice of the foreclosure at or about the time it took place and before paying over the \$450 as hereinafter stated. Before the foreclosure the

treasurer of the defendant bank had informed Black that he could have at any time the balance of the \$5,000 in its hands amounting to \$1,000. Subsequently to this, the money was trusted in the hands of the bank in a suit brought to recover for lumber used in the construction of the building. A portion of the \$1,000 was applied by the bank on the order of Black to the payment of interest which was overdue, and the balance, the \$450 in question, was paid over also on his order and used in the settlement of the suit above referred to. At the time of the payment of the \$450 there was interest due the bank on the mortgage.

The plaintiffs contend that the bank had as security for its loan a mortgage on the real estate and also the \$5,000 retained by it as above, and that it was bound as against and in favor of the subsequent mortgagee and his assigns to apply the \$450 to the payment of the interest that was due it on its mortgage. They also contend that the \$450 was by operation of law set off against the interest due the defendant. But the \$5,000 was not additional security. It was part of the sum lent and was retained to ensure the completion of the building and the \$450 has been applied to the payment for material which was used in the construction of the building. The case is not, therefore, a case for the application of the rule that a prior encumbrancer having two or more securities for his debt will be compelled to resort first to that on which the subsequent encumbrancer has no lien. The case relates rather to the application of the proceeds of the mortgage loan itself. What the effect, if any, would have been if the second mortgagees upon taking their mortgage had notified the bank of that fact, and had notified it not to pay over to the Blacks the \$5,000 or any part thereof, or if they had given such notice to the bank immediately upon the foreclosure, we need not consider, as no such notice was given. No doubt the bank could have offset the \$450 against the interest due it if the mortgagors had agreed that it might. Whether it could have done so if they did not agree, it is not necessary to decide. We do not see how the bank can be compelled to make such set-off, or, what is the same thing perhaps, on what ground the law itself can make it.

Decree affirmed.

G. A. Blaney, for the plaintiffs.

W. C. Williamson, for the defendant.

MARY A. CLARK & another vs. BENJAMIN LANCY
& another.

Suffolk. January 21, 1901. — April 3, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

In computing the five years from the sale within which a bill to redeem land from a tax sale must be brought under St. 1888, c. 890, § 76, the day on which the sale was made is to be excluded.

A bill to redeem land from a tax sale brought under St. 1888, c. 890, § 76, is a cause which may be revived by citing in the administrator of a party who has died.

The right to maintain a bill to redeem land from a tax sale under St. 1888, c. 890, § 76, is not limited to the owner or mortgagee who was such at the time of the tax sale, and where an owner of land, which previously had been sold for taxes without his knowledge, sold and conveyed the land and took a mortgage back, and subsequently on learning of the tax sale brought a bill to redeem under St. 1888, c. 890, § 76, and died, it was *held*, that the purchaser from the deceased had such an interest that he could have been admitted to prosecute the suit in the name of his grantor before his death if for any reason the grantor had declined to go on, and on the grantor's death could have procured the revival of the suit under Pub. Sta. c. 166, § 19, and proceeded in the name of his grantor's administrator, and therefore that such purchaser by an amendment of the bill properly could be made a plaintiff in the suit brought by his grantor, and that the five years within which the suit could be brought were to be reckoned as to him from the filing of the original bill.

One, who without consideration takes a conveyance of land from the purchaser thereof at a tax sale, holds the land as trustee for the party entitled to redeem, and is properly made a party to a bill to redeem, with no rights beyond those of his grantor.

In a suit to redeem land from a tax sale brought under St. 1888, c. 890, § 76, it appeared, that the defendant was a purchaser of tax titles, and there was evidence tending to show, that he intentionally avoided a tender during the two years after the tax sale, and thereafter refused to release except upon payment of a bonus, and that the plaintiff from the time of his discovery of the tax sale had endeavored to find the defendant and make tender before the two years had expired, and thereafter had been reasonably diligent in his efforts to obtain a release. *Held*, that the evidence warranted a finding that the plaintiff was entitled to relief, and that, the plaintiff having been always ready to redeem, the conduct of the defendant dispensed with the necessity of an actual tender.

Sections 46, 58 and 59 of St. 1888, c. 890, providing, that when the purchaser of land sold for taxes cannot be found after reasonable search, the owner seeking to redeem may make payment of the required sum to the treasurer of the town in which the land is situated, give a cumulative remedy, and do not exclude the right to equitable relief under § 76 of the same chapter.

MORTON, J. This is a bill to redeem from a tax title. The bill was filed October 12, 1898, and was originally brought in the name of Mary A. Clark against the defendant Benjamin

Lancy. She died in April, 1899, and upon motion of the defendant her administrator was cited in and appeared and took upon himself the prosecution of the suit. Subsequently an amended bill was filed in which the administrator and one York were joined as plaintiffs and Maria S. Lancy was joined with Benjamin Lancy as a defendant. There was a demurrer to this bill and also a motion to strike out certain paragraphs as irrelevant and immaterial and a motion to vacate the order of reference to a master. The demurrer and the motions were overruled. There was a decree for the plaintiff and the case is here on an appeal from that decree and from the order overruling the exceptions to the master's report. We have considered all the objections, which are numerous, raised by the defendants, but shall speak only of such as we think require notice.

At the time of the tax sale the premises belonged to the above named Mary A. Clark who had inherited them from her son George W. Clark. She was an aged woman living in Manchester, New Hampshire. The taxes, for the non-payment of which the premises were sold, were assessed in 1892 and the sale took place October 12, 1893. In 1894 Mrs. Clark conveyed the premises by deed with full covenants to York, and took back a mortgage. Early in 1895 York heard of the tax sale. Before that neither he nor Mrs. Clark knew that any tax had remained unpaid, or that the estate had been sold for taxes. Upon hearing of the tax sale York notified one of the administrators of the estate of George W. Clark who lived in Boston, and the master found that from that time until October 12, 1895, when the two years from the sale expired, reasonable diligence was used to find Lancy and to redeem the premises. The master also found that the delay, from that time until the filing of the bill, was accounted for partly by the fact that Lancy at all times refused to release except upon the payment of a substantial bonus, partly by the fact that York considered that it was the business of Mrs. Clark to clear the title, and partly because in consequence of some misunderstanding not fully explained the interests of Mrs. Clark were not attended to as they should have been. And upon the facts found by him the master reported that the plaintiffs were entitled to redeem.

Taking them up so far as possible in logical order the first

objection of which we deem it necessary to speak and one that is contained in the demurrer is that the bill was not brought within five years from the sale. The ground of this objection is that the five years began to run on the day of the sale which was October 12, 1893, and therefore that the bill, which was filed October 12, 1898, was filed one day too late. On this point we deem it enough to refer to *Bemis v. Leonard*, 118 Mass. 502.

The next objection, also contained in the demurrer, is that the five years had run as to York and Maria Lancy when they were made parties, and that York was not a necessary party. Mrs. Clark's interest as mortgagee passed to her administrator, (Pub. Sts. c. 133, § 6,) and it would be giving to the statutes in regard to redemption too narrow a construction to hold that he could not redeem. *Bowers v. Williams*, 34 Miss. 324. Blackwell, Tax Titles, (4th ed.) § 424, note. It is expressly provided that in suits in equity if a party dies, the administrator may be cited in, as was done here, if the cause was one that could be revived by him. Pub. Sts. c. 165, § 19. We have no doubt that this was such a cause. As to York, his interest was such that he could have been admitted to prosecute the suit in Mrs. Clark's name, if, for any reason, she had declined to go on, and on her death he could have procured its revival and could have proceeded in the name of her administrator. We think therefore that he was properly made a party and that the five years are to be reckoned so far as he is concerned from the filing of the original bill. As to Maria Lancy, upon the allegations in the amended bill she in effect held the title as trustee for the plaintiffs, and upon a judgment against the defendant Benjamin Lancy entitling the plaintiffs to redeem she could have been compelled by proper proceedings to convey to them. She was properly made a party therefore and the five years limitation would not operate in her favor. The case of *Smith v. Butler*, 176 Mass. 38, does not apply.

We see no ground on which the amended bill can be held to be multifarious.

The other causes of demurrer are that there is no equity in the bill and that no right to relief is disclosed. We shall consider them later.

The motion to strike out certain paragraphs was properly

overruled. They all contained allegations relevant and material to the plaintiffs' case.

The motion to vacate the order to the master was also rightly overruled. The reasons stated in the motion afforded no just ground for vacating the order.

We see no error in the admission of the testimony before the master to which the defendants object in their brief, and we treat the other objections as waived. This bill is brought under St. 1888, c. 390, § 76, and the right of a mortgagee or owner to relief under that section is not limited to the mortgagee or owner who was such at the time of the tax sale. *Stone v. Stone*, 163 Mass. 474. It was competent for the plaintiffs to show that there was no consideration for the deed to Maria Lancy. If she took the title without consideration she held it as already observed as trustee for the party entitled to redeem.

So far as the defendants' objections to the master's findings of fact are concerned we deem it enough to say that we think that there was evidence warranting the findings.

The remaining objections of the defendants with a single exception may be considered, so far as it is necessary to consider them, under the general one that upon the facts as found by the master and the evidence as reported the plaintiffs are not entitled to relief and no equity is disclosed and the bill should be dismissed. As already observed the bill is brought under St. 1888, c. 390, § 76. This section is a re-enactment of Pub. Sta. c. 12, § 66. Of those provisions it is said in *O'Day v. Bowker*, 143 Mass. 59, 62, that "These provisions were enacted, not for the purpose of extending in every case the time of redemption from two to five years, but for the purpose of permitting the court to grant relief, at any time within five years from the taking or sale of land, if the circumstances rendered it equitable." And later in the opinion it is said that the persons who are entitled to relief under that section are "in general, the same persons as those who have the right to redeem under the Pub. Sta. c. 12, § 49." The master found that as soon as York learned of the tax sale he notified Mr. Morse an attorney at law and one of the administrators of George W. Clark of the sale and he acting by authority of Mrs. Clark and York tried to find Lancy; that he went to the office of the tax collector and saw a notice appoint-

ing one Martin as Lancy's agent; that he wrote to Martin who replied that a letter directed to Lancy at Provincetown would reach him and either York or Morse wrote to Lancy saying that the money was ready and asking for an appointment and received a reply making an appointment at Young's hotel; that they went there at the time fixed but Lancy did not appear and that neither York nor any one representing the plaintiffs saw Lancy until after October 12, 1895; that in the spring of 1896 York found Lancy in Richfield Street in Boston and that from that time to the filing of the bill there were interviews and correspondence between the parties, but Lancy insisted at all times that the time for redemption had gone by and refused to release except on payment of a considerable bonus in addition to the ten per cent allowed by law. Upon the facts thus found and upon the findings previously referred to and the evidence as reported, we are of opinion that the finding by the master that the plaintiffs were entitled to redeem was well warranted. It appeared from the evidence that Lancy was a purchaser of tax titles and there was testimony tending to show or from which it might have been found, that he intentionally avoided a tender during the two years after the tax sale, and after that his refusal to release except upon payment of a bonus and the readiness of the plaintiffs to redeem dispensed with an actual tender. *Gormley v. Kyle*, 137 Mass. 189.

It could also have been found that his conduct was designed to evade and prevent a redemption, and that the plaintiffs have been reasonably diligent in their efforts to obtain a release. Under such circumstances it is plain that equity requires that the plaintiffs should be allowed to redeem.

The defendants further object that when the plaintiffs could not find Lancy or his agent and he neglected or refused to release they should have pursued the course provided in St. 1888, c. 390, §§ 46, 58, and 59. But we think that the remedy thus afforded was cumulative and was not intended to exclude the right to equitable relief under the provisions of § 76 of the same chapter upon a proper case being made out.

The result is that we think that the decree should be affirmed.

So ordered.

W. O. Childs, for the defendants.

N. C. Bartlett, for the plaintiffs.

AUGUSTIN X. DOWNEY vs. BENJAMIN LANCY & another.

Suffolk. January 22, 1901. — April 3, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

A bill to redeem land from a tax sale was amended by adding a prayer that the tax deed should be declared void and the defendant ordered to execute a release to the plaintiff. *Held*, on demurrer, that the bill was not multifarious by reason of the inconsistent nature of the relief sought, the case being one, not where different causes of action were joined but where alternative forms of relief were prayed for in respect to one and the same cause of action.

In a suit to redeem land in Boston from a tax sale brought by the purchaser of the land at a foreclosure sale, it was *held*, that upon the issue whether the owner, a married woman, was a non-resident when the tax sale was advertised, evidence, that the owner's husband was taxed in that year as a resident of Revere and was not assessed in Boston, was not admissible, as the suit was between third parties neither of whom claimed through the person taxed, and also because the evidence would not have been admissible against the husband himself.

Under St. 1888, c. 300, § 30, a demand for payment within fourteen days must be made upon a resident owner before his land can be sold for taxes. Section 33 of the same chapter in regard to non-resident owners does not require such demand. Section 43 of the same chapter requires that a tax deed shall state the cause of sale. A tax deed stated as the only cause of sale that, the owner of the land being a non-resident in the city and the taxes still remaining unpaid, the land was duly advertised for sale. In fact, the owner was a resident and a demand for payment within fourteen days had been made, but this was not stated in the deed. *Held*, that the deed was void for non-compliance with the statute.

The right of a mortgagee to redeem from a tax sale is not lost by foreclosure and passes to a purchaser at the foreclosure sale.

MORTON, J. This is a bill to redeem from a tax title. The tax was assessed by the city of Boston May 1, 1893, and the premises were sold for the non-payment of taxes December 15, 1894, to the defendant Lancy. At the time of the assessment one Honora Downey was the owner, and the Mutual Fire Insurance Company held a mortgage. Honora Downey died intestate December 12, 1898. The mortgagee entered to foreclose November 17, 1898, and the premises were sold by it December 14, 1898, under a power contained in the mortgage, to the plaintiff, who received a deed of the same January 11, 1899, and on the same day mortgaged them to one Martin. This mortgage is still outstanding and undischarged. The plaintiff first had notice of the tax sale on or about March 1, 1899. The bill was

filed May 1, 1899, and originally prayed that the plaintiff might be allowed to redeem. Afterwards it was amended so as to introduce a prayer that the tax deed should be declared void. The case was sent to a master, and on the coming in of his report exceptions thereto were filed by the plaintiff and the defendants. The exceptions of both were overruled, and the report of the master affirmed in its findings of fact and a decree was entered declaring the tax deed null and void, and directing the defendant Lancy to execute a release to the plaintiff. The defendant appealed from this decree and also from the order of the court overruling his exceptions to the master's report. The plaintiff also appealed from the order overruling his exceptions to the master's report.

The defendant demurred to the bill as amended on the ground that it was multifarious by reason of the inconsistent nature of the relief sought in the two prayers. The demurrer was overruled. The printed record does not show that there was any appeal from this order, or from the order overruling the defendant's motion to strike out paragraph 9 of the amended bill. Assuming that the question is before us, the demurrer was rightly overruled. The case is not one where different causes of action are joined but where alternative forms of relief are prayed for in respect to one and the same cause of action.

The principal question at issue related to the residence of Honora Downey at the time of the assessment of the tax of May 1, 1893. This was a mixed question of law and fact. The plaintiff contended that her residence was in Charlestown and the defendant that it was in Revere. There was considerable testimony of a conflicting nature on the question. The plaintiff and his father and other witnesses testified that her residence was in Charlestown. The defendant introduced testimony tending to show that her residence was in Revere. The master found that it was in Charlestown. We have examined the evidence as reported and cannot say, as we should be obliged to say in order to sustain the defendant's exceptions, that the finding was clearly erroneous. The master had the witnesses before him, and in a matter involving the weighing of testimony could judge better than we can of the degree of credibility to which they were entitled. What we have said in regard to the master's finding as

to the matter of residence applies generally to the other findings of fact by the master which the defendant excepted to.

In addition to his exceptions to the findings of fact, the defendant also excepted to certain rulings of the master excluding evidence that was offered by him as bearing on the question of Honora Downey's residence on the 1st of May, 1893.

The testimony that was excluded, was offered as tending to show the residence of Michael J. Downey the husband of Honora Downey and thus as tending to show her residence and consisted principally of entries upon the assessors' and collector's books of Revere tending to show that Michael J. Downey was assessed for and paid a poll tax there as of May 1, 1893, and of an offer to show that there were no entries on the assessors' and collector's books of Boston that he was assessed for or paid a poll tax in Boston that year. There was also an offer to show certain poll tax entries, though what they were did not appear, which were made in a street book by an assessors' clerk of Boston in 1893, in consequence of information received at 24 Water Street, Charlestown, where the plaintiff claimed that Honora Downey resided, and also to show whether it appeared from information received at that house that Michael J. Downey lived there at that time.

If the town of Revere had brought suit against Michael J. Downey to recover a tax assessed upon him for 1893, claiming that he was a resident of that town, it is clear the testimony that he had not been assessed in Charlestown would have been inadmissible. *Mead v. Bozborough*, 11 Cush. 362. *A fortiori* was it inadmissible here. But further this is an action between third parties neither one of whom claims under Michael J. Downey and his acts and admissions in regard to the payment and amount of his taxes are inadmissible so far as the residence of Honora Downey was concerned, notwithstanding she was his wife. *Commonwealth v. Heffron*, 102 Mass. 148.

We think, therefore, that the testimony was rightly excluded. We see no error in regard to the exclusion of the other testimony that was offered. It was irrelevant, or immaterial, or the form in which the question that was ruled out was put, was objectionable.

The remaining questions relate to the tax deed, and to the effect, if any, of the foreclosure sale on the right of redemption.

The statute requires that when real estate is sold for non-payment of taxes the "deed shall state the cause of sale." St. 1888, c. 390, § 43. In the case of a resident a tax on real estate may "be levied by sale thereof, if the tax is not paid within fourteen days after a demand of payment made either upon the person taxed or upon any person occupying the estate." St. 1888, c. 390, § 30. In the case of a non-resident no demand need be made. St. 1888, c. 390, § 33. The only cause stated in the collector's deed to the defendant was "the said Honora Downey owner of said real estate being a non-resident in said Boston, and said taxes still remaining unpaid, I duly advertised said real estate," etc. In view of the fact that Honora Downey was found to be a resident of Charlestown this was plainly insufficient and the deed was therefore void. *Langdon v. Stewart*, 142 Mass. 576. *Reed v. Crapo*, 127 Mass. 39. *Harrington v. Worcester*, 6 Allen, 576. In order to comply with the statute the deed should have stated as the cause of that sale that a demand had been made on the said Honora Downey, as the master found was the fact, for payment of the tax and that the same had not been paid within fourteen days after such demand. Cases *supra*. There is nothing in the objection that the right to redeem which the mortgagee had was destroyed by the foreclosure and did not pass to the plaintiff. See *Lancy v. Abington Savings Bank*, 177 Mass. 431; *McGauley v. Sullivan*, 174 Mass. 303; *Stone v. Stone*, 163 Mass. 474. The evidence of the value of the property introduced by the plaintiff did the defendants no harm in view of the fact that the deed was held to be void even if it was inadmissible, which we do not decide.

Decree affirmed.

T. F. Reddy, (*J. D. Graham & W. J. Miller* with him,) for the plaintiff.

W. O. Childs, for the defendant Lancy.

TREMONT AND SUFFOLK MILLS *vs.* CITY OF LOWELL.

Middlesex. March 6, 1901. — April 3, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

The corporate franchise tax under Pub. Sts. c. 18, § 40, and the local tax on the property of a corporation are not complementary taxes. The determination by the tax commissioner of the value of real estate and machinery subject to local taxation, to be deducted from the valuation of the capital stock under the provisions of that section, does not bind the assessors of the city or town where they are situated, and if the tax commissioner adopts the valuation of the real estate and machinery of a manufacturing corporation made by the assessors of a city, and the corporation pays its franchise tax upon that basis, this does not deprive the corporation of its right to apply to the assessors under Pub. Sts. c. 11, for an abatement of the tax on the ground of over-valuation and to appeal from their decision to the Superior Court under St. 1890, c. 127.

PETITION by a manufacturing corporation to the Superior Court under St. 1890, c. 127, appealing from a decision of the assessors of the city of Lowell refusing to make an abatement in a tax upon the real and personal property of the petitioner in that city alleged to be excessive by reason of the over-valuation of the property assessed, filed June 6, 1898.

In the Superior Court the case was heard, upon the report of a commissioner appointed under the provisions of St. 1890, c. 127, by *Lawton, J.*, who, at the request of both parties, reported the case for the consideration of this court.

It appeared by the report that the petitioner requested nine rulings, of which the ninth was as follows: "Ninth. That the facts that the tax commissioner in determining the excise tax to be paid to the State has determined the assessed value of said real estate and machinery fixed by the assessors of Lowell to be just, and has deducted from his determination of the market value of the shares such assessed value of the real estate and machinery, and that the petitioner has paid its franchise tax to the State upon that basis, if established, were not a bar to the maintenance of its petition." The judge declined to give this or any of the rulings requested, and the petitioner excepted. The other requests were made immaterial by the ruling of the judge.

The judge ruled *pro forma* "that, the tax commissioner in determining the excise tax to be paid to the State, having determined the assessed value of the real estate and machinery as fixed by the assessors of Lowell to be just, and having deducted from his determination of the market value of the shares such assessed value of the real estate and machinery, and the petitioner having paid its franchise tax to the State upon that basis, it was not entitled to claim under the provisions of Pub. Sts. c. 11, an abatement of its tax on account of over-valuation of its real estate and machinery by the assessors, and that it was not entitled to maintain its petition," and found for the respondent. To this ruling the petitioner excepted.

The report of the commissioner and the petitioner's exceptions to and motion to re-commit that report were made a part of the report to this court. If the overruling of the petitioner's exceptions to and the refusal to re-commit the commissioner's report, and the rulings and refusals to rule were correct upon all matters material to the finding, judgment was to be entered for the respondent. If they, or any of them, were erroneous, and the petitioner had been prejudiced or aggrieved thereby, the cause was to be remanded to the Superior Court for such further proceedings as justice might require.

F. E. Dunbar, for the petitioner.

F. W. Qua, for the respondent.

HOLMES, C. J. This is a petition for the abatement of taxes assessed by the city of Lowell upon the petitioner's real estate and machinery, for the year 1897. It was proved, subject to the exception of the petitioner, that the tax commissioner, in determining the franchise tax to be paid by the corporation for the same year, had taken as the value of the real estate and machinery to be deducted under Pub. Sts. c. 13, § 40, the valuation now sought to be abated, and that the petitioner had paid the tax thus determined. Thereupon the Superior Court ruled that the petitioner was not entitled to an abatement under Pub. Sts. c. 11, §§ 69-71, St. 1890, c. 127, and reported the case.

The argument in favor of the ruling regards the franchise tax and the local tax on real estate etc. as if they were complementary taxes intended to divide the property of the corporation between them, and finds a sufficient support for the ruling in

the consideration that, if there were an abatement now made on the valuation deducted for the franchise tax from the fair cash valuation of the shares, a part of the petitioner's property would escape taxation. But it appears to us very plain that this argument is a fallacy and that the ruling was wrong.

The franchise tax is not a tax on the property of the corporation, and its validity sometimes has depended upon this consideration. *Commonwealth v. Hamilton Manuf. Co.* 12 Allen, 298. *Commonwealth v. Cary Improvement Co.* 98 Mass. 19. *National Bank of Commerce v. New Bedford*, 155 Mass. 313. It is true that to prevent the technical distinction being made the excuse for double taxation it is provided that the real estate etc. taxed locally shall be deducted from the value of the stock in valuing the franchise. But that does not mean that the franchise tax is a tax on the property of the corporation, as the cases cited sufficiently show.

The proceedings for abatement in Pub. Sts. c. 11, and St. 1890, c. 127, are given in general terms, and we perceive no warrant for denying them in the fact that another officer having a different end in view has adopted the valuation sought to be revised. The possibility of such escape as is involved in a difference between the valuation of the real estate for purposes of assessment and the valuation of the same property for purposes of deduction must be admitted to exist if the tax commissioner should value the real estate higher than the local assessors. It is intimated that this is not likely to happen. But it may happen, and the suggestion to the contrary is significant mainly as warranting the assumption that the officer in charge of the franchise tax will look out for the interests of the Commonwealth whether he does or does not agree with the assessors of a town. On the other hand, when it comes to taxing specific property, there is no reason why the party concerned should not have the usual safeguards and rights which all other persons have. In the case where a corporation might be wronged by the tax commissioner's deducting less than the valuation of the local assessors, a proceeding is provided by c. 13, § 41, which shall be binding on all concerned. But in that case if the corporation does not go to the assessors and county commissioners for an abatement, it may be bound to accept a smaller deduction than the value

on which it pays a tax. In the opposite case probably it was thought that the Commonwealth and its towns would protect their own interests. Certainly the public welfare would not suffer, and there would not be even an inconsistency in theory, if it should happen that a corporation paid a tax on land to a city at a smaller valuation than that set upon it for the determination of what it should pay for its franchise to the State.

Case remanded to the Superior Court.

GEORGE D. DANFORTH vs. GROTON WATER COMPANY.
VALE MILLS vs. SAME.

Middlesex. March 8, 1901. — April 3, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

The Legislature has a limited but not clearly defined power to pass laws affecting pending cases relieving just claims from defeat through mistake of procedure.

St. 1900, c. 299, providing that "No petition now or hereafter pending in the superior court for the assessment by a jury of damages sustained by any person by reason of any taking of property in the exercise of the right of eminent domain shall be dismissed for want of jurisdiction in said court solely on the ground that no previous application for the assessment of such damages had been made to a board of county commissioners, or that no award thereof had previously been made by a board of county commissioners," is not unconstitutional as applying to petitions against a corporation pending in the Superior Court, which before the act would have been dismissed because the petitioners had not applied first to the county commissioners, and where by the terms of the respondent's charter, the time for filing a new petition had expired. The effect of the act in saving the petitioners from being barred by the limitation in the respondent's charter is only secondary and accidental, and what is done directly is to enact that parties already in court shall not be defeated for neglect of a useless form.

TWO PETITIONS to the Superior Court for a jury to assess damages for the taking of certain alleged water rights by the respondent under its charter, St. 1897, c. 338, filed October 19, 1898.

At the hearing in the Superior Court, before *Braley, J.*, the respondent moved to dismiss the petitions for want of jurisdiction of that court on the ground that no application had been

made in the first instance to the county commissioners of Middlesex County for an estimate of the damages suffered by the petitioners, and that it did not appear that the county commissioners had ever made any estimate of such damages, or that the petitioners were in fact or in law aggrieved by the doings of the county commissioners in the estimate of their damages. It was agreed that in fact no application had been made to the county commissioners for the assessment of damages. It appeared that the respondent first actually withdrew and diverted the water under authority of its charter, in November, 1897.

The judge ruled that the Superior Court had no jurisdiction, and dismissed the petitions. To this ruling the petitioners excepted, and, at the request of the parties, the judge reported the cases for the determination of this court.

The cases were submitted on briefs to this court on March 6, 1900, and on May 17, 1900, a rescript was handed down in each case sustaining the ruling of the Superior Court and directing an entry in that court in each case as follows: "Petition dismissed." The reason of the decision was stated therein as follows: "The petitioner should first have made application to the county commissioners." The opinion of the court is reported in 176 Mass. 118.

Between the time of the submission of the cases on briefs and the handing down of the rescripts, the Legislature on May 4, 1900, passed St. 1900, c. 299, which reads as follows: "Section 1. No petition now or hereafter pending in the superior court for the assessment by a jury of damages sustained by any person by reason of any taking of property in the exercise of the right of eminent domain shall be dismissed for want of jurisdiction in said court solely on the ground that no previous application for the assessment of such damages had been made to a board of county commissioners, or that no award thereof had previously been made by a board of county commissioners. The superior court shall have jurisdiction to hear and determine all such petitions now or hereafter filed or pending therein, notwithstanding the lack of such previous application to or award by a board of county commissioners. Section 2. This act shall take effect upon its passage. Approved May 4, 1900."

Subsequently, the existence of the statute having been brought

to the attention of the court, by agreement of the parties in both cases a rehearing was granted on the question of the effect of the act upon these cases.

The charter of the respondent contained the following provision: "Said corporation shall pay all damages sustained by any person in property by the taking of any land, right of way, water, water source, water right or easement, or by any other thing done by said corporation under the authority of this act. Any person sustaining damages as aforesaid under this act, who fails to agree with the said corporation as to the amount of the damages sustained, may have the damages assessed and determined in the manner provided by law when land is taken for the laying out of highways, on application at any time within one year from the taking of such land or other property or the doing of other injury under the authority of this act; but no such application shall be made after the expiration of the said one year. No application for the assessment of damages for the taking of any water, water right or water source, or for any injury thereto, shall be made until the water is actually withdrawn or diverted by the said corporation under the authority of this act." St. 1897, c. 338, § 4.

Under this section the petitioners' right to apply for the assessment of their damages expired in November, 1898, one year from the time when the water was actually withdrawn or diverted by the respondent, so that if their present petitions were dismissed they would be without remedy.

W. H. Bent, for Danforth.

C. K. Cobb & W. D. Whitmore, Jr., for the Vale Mills.

W. F. Wharton, for the respondent. The Legislature cannot remove a bar or limitation which has already become complete. *Bigelow v. Bemis*, 2 Allen, 496, 497, and cases there cited.

Neither St. 1857, c. 133, nor the similar St. 1874, c. 341, extending the time for filing a petition, revived a right of action for damages for land taken to widen a street which was barred by the limitation of time before the passage of these statutes. *Loring v. Boston*, 12 Gray, 209. *Kinsman v. Cambridge*, 121 Mass. 558.

The Legislature cannot accomplish by indirection what it cannot accomplish directly. After the period of limitation in which

an application for an assessment of damages should have been made under the charter of the respondent corporation had expired, the corporation had not only the vested right to plead the statute of limitations as a defence, but it had also the vested right to hold the water rights taken free from the possibility of any claim for damages.

It is submitted that in St. 1900, c. 299, the Legislature has neither expressly nor impliedly manifested any intention to give to the Superior Court jurisdiction of causes of action barred by any statute of limitation at the time of the passage of that law; and, further, if such intention has been expressed, the provisions of law attempting to carry it out are clearly beyond the power of the Legislature to enact.

HOLMES, C. J. These are petitions to the Superior Court for a jury to assess damages for the taking of water rights. The respondent filed motions to dismiss on the ground that the petitioners had not applied first to the county commissioners. The Superior Court dismissed the petitions, and on report its action was sustained by this court. 176 Mass. 118. The decision was rendered on May 17, 1900. On May 3 had been passed c. 299 of the statutes of that year, but it escaped every one's attention until after the rescript had gone. A rehearing subsequently was granted by agreement of all concerned, on the single question of the effect of that act upon this case.

The water was actually withdrawn in November, 1897, and was taken not later than that date. By the respondent's charter, the right of the petitioners to apply for the assessment of damages was limited to one year from the taking. Therefore as the law stood just before the enactment of St. 1900, c. 299, the petitioners had lost their chance of recovery from the respondent, because it then was too late to file new applications, and, as the previous decision in this case has shown, the petitions on file could not be entertained.

The statute provides that no such petition as the present "now or hereafter pending in the superior court . . . shall be dismissed for want of jurisdiction in said court solely on the ground that no previous application for the assessment of such damages had been made to a board of county commissioners." These words seem to us plainly to apply to the present petitions.

It is true that the petitions had been ordered to be dismissed, but the orders were made subject to a report to this court, as we have said, and the cases were still pending in the Superior Court. There can be no doubt of the intent of the statute, and the only question is whether it is constitutional with regard to those who, like the respondent, at the time of its passage had a good defence. There certainly is a strong argument that as against parties in the respondent's position the act cannot be sustained.

In *Campbell v. Holt*, 115 U. S. 620, in which it was held by a majority of the court that a repeal of the statute of limitations as to debts already barred violated no rights of the debtor under the fourteenth amendment, Mr. Justice Miller speaks as if the constitutional right relied on were a right to defeat a just debt. But the constitutional right asserted was the same that would be set up if the Legislature should order one citizen to pay a sum of money to another with whom he had been in no previous relations of any kind. Such a repeal requires the property of one person to be given to another when there was no previous enforceable legal obligation to give it. Whether the freedom of the defendant from liability is due to a technicality or to his having had no dealings with the other party, he is equally free, and it would seem logical to say that if the Constitution protects him in one case it protects him in all. With regard to cases like *Campbell v. Holt*, under the State Constitution the later intimations of this court have been that such a repeal would have no effect. *Bigelow v. Bemis*, 2 Allen, 496, 497. *Prentice v. Dehon*, 10 Allen, 353, 355. *Ball v. Wyeth*, 99 Mass. 338, 339. See also *Kinsman v. Cambridge*, 121 Mass. 558; *Rockport v. Walden*, 54 N. H. 167; *McCracken County v. Mercantile Trust Co.* 84 Ky. 344; Cooley, Const. Lim. (6th ed.) 448.

Nevertheless in this case, as in others, the prevailing judgment of the profession has revolted at the attempt to place immunities which exist only by reason of some slight technical defect on absolutely the same footing as those which stand on fundamental grounds. Perhaps the reasoning of the cases has not always been as sound as the instinct which directed the decisions. It may be that sometimes it would have been as well not to attempt to make out that the judgment of the court was

consistent with constitutional rules, if such rules were to be taken to have the exactness of mathematics. It may be that it would have been better to say definitely that constitutional rules, like those of the common law, end in a penumbra where the Legislature has a certain freedom in fixing the line, as has been recognized with regard to the police power. *Camfield v. United States*, 167 U. S. 518, 523, 524. But however that may be, multitudes of cases have recognized the power of the Legislature to call a liability into being where there was none before, if the circumstances were such as to appeal with some strength to the prevailing views of justice, and if the obstacle in the way of the creation seemed small.

In some such cases there has been at an earlier time an enforceable obligation, in others there never has been one, but in both classes the courts have laid hold of a distinction between the remedy and the substantive right, or have said that "a party has no vested right in a defence based upon an informality not affecting his substantial equities," *Cooley*, Const. Lim. (6th ed.) 454, or that "there is no such thing as a vested right to do wrong," *Foster v. Essex Bank*, 16 Mass. 245, 273, or have called it curing an irregularity, *Thomson v. Lee County*, 3 Wall. 327, 331, *Lane v. Nelson*, 79 Penn. St. 407, *Randall v. Kreiger*, 23 Wall. 137, or have dwelt upon the equities, meaning the moral worth of the claim that was preserved, or by one device or another have prevented a written constitution from interfering with the power to make small repairs which a legislature naturally would possess.

In a case which would seem almost stronger than that of a debt barred by the statute of limitations it was held that services of an unlicensed physician which could not be recovered for when rendered were made a good cause of action by a repeal of the statute which created the bar. *Hewitt v. Wilcox*, 1 Met. 154. So in case of a usurious contract after a repeal of the usury law. *Ewell v. Daggs*, 108 U. S. 143.

The constitutional difficulties in the way of the present statute are as small as they well can be. Its effect in saving the petitioners from being barred by the statute of limitations in the respondent's charter is only secondary and accidental. All that it does directly which is open to question is to enact that parties

having a case in court shall not be turned out for neglect of what under the circumstances was a naked and useless form. The case is stronger for the petitioners than *Campbell v. Holt* or *Hewitt v. Wilcox*. The respondent had incurred a legal obligation to them which, although not contractual, was voluntary and legal, and which was entitled to the highest protection of the law, as it sprang from the exercise of eminent domain. The petitioners were enforcing the obligation in good faith. There is no especially striking equity in favor of defeating them because of a mistake of procedure, and as the Legislature now has said that they shall not be defeated, we have not much hesitation in yielding to the current of decisions and in accepting its mandate as authoritative in this case.

Motions overruled.

GEORGE F. SEAMAN vs. WILLIAM H. COLLEY.

Suffolk. March 14, 1901. — April 3, 1901.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

One of two executors had been found by a jury to have induced the testator by fraud or undue influence to make a certain codicil, and these findings had been set aside and a new trial granted. Without the knowledge of the court in which the probate of the codicil was pending, this executor personally made a contract to pay \$500 to one of the two next of kin of the testator in consideration of his withdrawing his opposition to the probate of the codicil. There was no evidence of fraud. *Held*, that this contract was enforceable and not contrary to public policy.

CONTRACT to recover the sum of \$500, alleged by the plaintiff to have been promised to him by the defendant in consideration of the withdrawal of his objections to the allowance of the third codicil to the will of one Nathaniel Springfield. Writ dated May 29, 1899.

The answer contained a general denial and also alleged that the contract declared on was void as being against public policy.

At the trial in the Superior Court, before *Bond, J.*, it appeared, that Nathaniel Springfield, formerly a slave, came North before the Civil War, and died testate on December 17, 1896, leaving an estate of about \$30,000; that the plaintiff was the

only child of a deceased daughter of Springfield, whose only other next of kin was a son, Theophilus Springfield; that his will with three codicils was presented for probate by the executors therein named, Henry A. Halliday and William H. Colley, the defendant; that Theophilus Springfield and the plaintiff appeared and opposed the probating of the will and codicils; that the Probate Court admitted the will and codicils to probate; that Theophilus Springfield and the plaintiff appealed to the Supreme Judicial Court; that at the hearing of the case before *Lathrop, J.*, issues were framed for the jury in regard to the third codicil only; that the issues and the answers thereto were as follows: "First Issue. Was the instrument which is offered for probate as the third codicil to the will of the said Nathaniel Springfield, and dated July 17, 1896, duly executed by him as and for a third codicil to his last will? Answer. Yes. Second Issue. Was the said Nathaniel Springfield, at the time of the execution of said third codicil, of sound mind? Answer. No. Third Issue. Was the said Nathaniel Springfield induced by the fraud or undue influence of William H. Colley or Henry A. Halliday to execute said third codicil? Answer. Yes, as to William H. Colley. No, as to Henry A. Halliday"; that on motion of the executors to set aside the verdict on the second and third issues as against the evidence and the weight of evidence, the justice set aside the verdict on those issues and granted a new trial; that shortly before the new trial took place one Thomas E. Bowser was appointed guardian of Theophilus Springfield, who was weak minded, and William Schofield was appointed guardian of unborn children of Theophilus and the plaintiff; that at the following term, April, 1898, when the case came on for trial, a writing signed by the present plaintiff was presented to the court by the counsel for the present defendant, stating in effect that the plaintiff withdrew his appeal and waived his objections, and thereupon the will and codicils were allowed; and that the court was not informed of the alleged contract. These facts were not disputed.

The plaintiff testified in substance that early in February, 1898, after the verdict had been set aside and a new trial granted, and about seven weeks before the case came on again for trial, the defendant promised to pay him \$300 in money and

give him \$200 to start in business, if he would waive his objections to the third codicil; that he accordingly withdrew his appeal in writing, and consented to the probating of the will, but the defendant had refused to pay him any part of the money promised.

The defendant denied that he had made any agreement to pay the plaintiff \$500 or any sum whatever to waive his appeal, and alleged that the plaintiff had done it voluntarily.

The defendant's counsel made the following requests for rulings: 1. That the contract set forth in the plaintiff's declaration is against public policy. 2. That upon all the pleadings and evidence in the case the contract set forth and testified to by the plaintiff is void as against public policy.

These rulings were refused by the judge, and the defendant excepted.

The judge instructed the jury that if they were satisfied upon the evidence that the defendant had promised to pay the plaintiff \$500 as testified to by the plaintiff if he would waive his objections to the third codicil and the plaintiff did waive his objections, it would be a valid promise and the plaintiff would be entitled to recover. The defendant excepted to this instruction.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

F. K. Linscott, for the defendant.

W. J. Williams, for the plaintiff.

HOLMES, C. J. This is an action on a contract to pay the plaintiff \$500 in consideration of his withdrawing his opposition to the probate of the third codicil to his grandfather's will. The probate court had admitted the will and codicils to probate, an appeal had been taken, and the plaintiff and the other next of kin had prevailed before the jury on the issues of sanity and undue influence of the defendant, who was one of the executors. These findings had been set aside, and when the case came on for another trial the plaintiff waived his objections, and the will and codicils were allowed. The court was not informed of the agreement now sued upon. At the trial of the present case a ruling was asked that the contract was against public policy. The ruling was refused, and the case is here on exceptions.

It is argued that the contract was a fraud upon the court, the other appellant and the estate, but in our opinion only the first branch of the argument is open.

The other next of kin was a weak minded son of the testator, who was under guardianship, but it does not appear that his conduct or that of any other person than the parties to the bargain was influenced, or was expected or even likely to be influenced, by the plaintiff's course. It does not appear that the other parties to the appeal were not informed of the plaintiff's arrangement and of the motives which induced his change. Therefore *Adams v. Outhouse*, 45 N. Y. 318, does not apply. The will and codicils are not before us, and it does not appear that there was any other interest to be affected. The only ground on which it can be argued that the bargain was against public policy is that such bargains cannot be made without informing the court, for, if the matter had been known to every one, it would be absurd to say that the plaintiff was not free to consult his own interest in opposing or withdrawing opposition to the codicil, as well for money as without it. Indeed such arrangements as the present have been said to be entitled to the highest favor of the courts. *Leach v. Fobes*, 11 Gray, 506.

But it was not necessary that the court should be informed of the plaintiff's motives. The court had no interest in the matter. Civil proceedings in court are not scientific investigations the end of which always must be objective truth. No doubt the failure to inform the court might be coupled with other circumstances in such a way as to show that the agreement was part of a scheme of fraud. If there was evidence of any fraud on any one interested, we presume that the defendant had the chance to argue that as well as his denial of the contract. But there is nothing in the bill of exceptions that shows fraud as matter of law, or even raises any particular suspicion of it. The fact that the defendant denied the contract almost, if not quite, excludes the notion of connivance between him and the plaintiff to the detriment of the testator's son. See *Boston Bar Association v. Greenhood*, 168 Mass. 169, 187, 188.

It is suggested that the tendency of the contract on the defendant's part is to make him seek to reimburse himself out of the estate. This appears to us entirely speculative. The de-

fendant's accounts will be open to scrutiny, and no doubt the parties interested in them will have their eye upon him in case the temptation which he has suggested should become real.

Exceptions overruled.

ÆTNA MILLS vs. INHABITANTS OF BROOKLINE.

ELLEN E. BISHOP, executrix, vs. SAME.

WILLIAM S. CORDINGLEY & another vs. SAME.

WALKER AND PRATT MANUFACTURING COMPANY vs. SAME.

BOSTON MANUFACTURING COMPANY vs. SAME.

MARY W. CREHORE & others vs. SAME.

HOLLINGSWORTH AND WHITNEY COMPANY vs. SAME.

RICHARD H. PAINE & another, executors, vs. SAME.

WILLIAM T. RYLE & others vs. SAME.

DUDLEY MILLS vs. SAME.

JOHN C. SULLIVAN & another, administrators, vs. SAME.

HENRY D. POPE, trustee, vs. SAME.

Suffolk. March 21, 1901. — April 8, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Under St. 1888, c. 131, giving the town of Brookline authority to take additional water from Charles River, that town established waterworks upon the division line between the counties of Norfolk and Suffolk. St. 1872, c. 343, § 6, incorporated by reference in the above named act, gave to persons sustaining damages under the act the right to apply for an assessment thereof by petition to the Superior Court in the county in which the dams or other works occasioning such damages were situated. Petitions to the Superior Court under this section by owners of water powers and mill privileges upon the Charles River were filed simultaneously in both counties, and orders of notice thereon were served on the town, those on the petitions in Norfolk County being issued and served nine days before those on the petitions in Suffolk County. The petitioners then filed in each county motions for the appointment of commissioners to assess their damages under the section above named. On motion of the town, the Superior Court ordered the petitions in Suffolk County to be dismissed on the town's filing an admission that it was liable in Norfolk County, if at all. *Held*, that the order dismissing the petitions in Suffolk County was erroneous, as the petitioners had the right to elect in which county to proceed, that they had not done so merely by taking out the orders of notice upon their petitions in Norfolk

County first, and that the court by its action had in effect given the respondent the election which belonged to the petitioners. *Semble*, however, that the damages occasioned by taking water under St. 1888, c. 181, cannot be divided into those caused by the part of the town's waterworks in Norfolk County and those caused by the other part of the same works in Suffolk County, but that the whole damage must be assessed under one petition, in one county or the other at the election of the petitioners.

BARKER, J. The several petitioners are owners of water powers and mill privileges upon the Charles River. The respondent having accepted St. 1888, c. 181, and in pursuance thereof, on May 20, 1891, by vote declared its purpose to take from the river an additional one million and a half gallons of water daily became liable to pay all damages sustained by any persons in their property by this taking of the waters. The provision for recovery of such damages, when the person sustaining them does not agree with the town, is by reference to St. 1872, c. 343. That statute gives to persons sustaining such damages and not agreeing upon them with the town the right to apply for an assessment of the same by petition to the Superior Court in the county in which the dams or other works occasioning the damages are situated. St. 1872, c. 343, § 6. The works by which the respondent takes water, and which the several petitioners contend damage them in their property are situated upon the division line between the counties of Norfolk and Suffolk, and so are partly in each of those counties. Each petitioner filed simultaneously in each of those counties a petition to the Superior Court for the assessment of his damages. Orders of notice were issued first in Norfolk and nine days later in Suffolk, and all these orders of notice were served upon the respondent. Thereafter answers were filed to all of the petitions. Each petitioner then filed in each of his petitions a motion for the appointment of commissioners under St. 1872, c. 343, § 6, to assess the petitioner's damages. These motions in both sets of petitions were all heard together. At this hearing the respondent, while admitting the petitioners' right to proceed in either county, denied their right to proceed in both at the same time, objected to the appointment of commissioners in more than one county, and asked that they be appointed only in Norfolk County. The petitioners insisting upon their right to maintain all of their petitions, the respondent moved that the

petitions filed in Suffolk should be dismissed, offering to file in the Norfolk cases a stipulation as an admission of record that if it was liable to the petitioners at all it was liable in the county of Norfolk and not in the county of Suffolk. The court decided that if the respondent would file such an admission of record in the Norfolk cases the Suffolk petitions should be dismissed without costs. Thereupon such stipulations were filed and the Suffolk cases were ordered to be dismissed without costs, subject to the petitioners' exceptions.

We are of opinion that the exceptions should be sustained. It is properly conceded by the respondent that each petitioner, under the provisions of St. 1872, c. 343, § 6, could make petition to the court in either county where the works of the respondent were in part situated. Each petitioner therefore had the choice of having his damages assessed in either county. He did not make an election by filing petitions simultaneously in both counties. It would be too strict to hold that he made an election by taking out an order of notice upon his Norfolk petition before he took such an order upon his Suffolk petition. After orders of notice had issued upon both petitions and had been served, the respondent without protest because of the pendency of two petitions, and without asking that the petitioner be compelled to elect, answered each petition upon the merits. The filing and the bringing on for hearing before the same court and at the same time, by each petitioner, of motions for the appointment of commissioners in each of his petitions was not an election between the two, nor was his insistence that he could prosecute both, such an election. He still had the right to exercise it, if as the respondent contends both of his petitions were for the assessment of the same damages. Of this right he was deprived by the orders of the court dismissing the Suffolk petitions upon the respondent's request. In effect the election which belonged to the petitioner was given to the respondent.

It is not necessary for us to say what course shall be taken in these cases by the court below, further than to say that the exceptions are sustained and that the orders dismissing the Suffolk petitions must be rescinded. But we are of opinion that the respondent is right in its contention that the reasonable construction of the statute is that the damages occasioned by the

respondent's taking under St. 1888, c. 131, cannot be divided into damages occasioned by the part of its works situated in Norfolk and damages occasioned by the other part of the same works situated in Suffolk, but that the whole damages are to be assessed in one petition, in one county or the other at the election of the petitioner. See *Bates v. Ray*, 102 Mass. 458; *Miller v. County Commissioners*, 119 Mass. 485; *Brockton v. Cross*, 138 Mass. 297.

Exceptions sustained.

R. F. Herrick, for the petitioners.

W. D. Turner & A. H. Latham, for the respondent.

GEORGE W. HASKELL vs. CAPE ANN ANCHOR WORKS.

Essex. March 7, 1901. — April 4, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

In an action by an experienced workman to recover for injuries from the fall of a bar of steel caused by the breaking of a defective link in the chain supporting it, it appeared, that the plaintiff attached the chain to the bar which then was hoisted by means of a crane, the plaintiff steadying the bar with his hand. While he was doing this the link next to the hook broke and the plaintiff received his injuries. The chain used was the only one which reasonably could have been used under the circumstances. It was made in the defendant's works by a fellow servant of the plaintiff, and the defect in the link was due to its being made from old iron instead of new. *Held*, that a verdict for the plaintiff was justified; that the defendant was responsible for the use of due care in preparing a safe appliance for the plaintiff's use, and the chain was a permanent instrument provided for the very purpose for which it was used when it broke, and was not worn out but broke from inherent defects that should have been avoided in its making and could not be detected by inspection; and that it was no defence that the proximate cause of the breaking of the permanent appliance was the negligence of a fellow servant in making it. *Held, also*, that the fact that the plaintiff was under a suspended weight which would crush him if it fell did not necessarily establish negligence on his part, and on the facts proved he would have been safe under the bar if the link had been made of new iron as it should have been.

For a presiding judge to state his recollection of the evidence is not charging the jury with respect to matters of fact.

HOLMES, C. J. This is an action of tort for personal injuries caused by the fall of an ingot or bar of steel upon the plaintiff in consequence of the breaking of a chain by which the ingot

was supported. It is before us on exceptions raising the usual issues. The action is at common law and also under St. 1887, c. 270 and its amendments, but nothing turns upon the pleadings.

The plaintiff was an experienced workman in the defendant's employ. He was directed to get the ingot upon a car. He looked for a chain and took the only one he saw in the neighborhood. This was what was called a single chain, and there was nothing to indicate that it was not as good as any chain of its class. The only stronger ones were what were called double chains, of which there were two somewhere about the works, one of them however without a hook. The plaintiff testified that the single chains always were used and were the proper chains to use for bars of this size (four thousand pounds). He also testified that the double chain, even if forthcoming without a delay which would have led to some one else doing the work, could not be used for a bar of this size. This testimony, although controverted, was not contradicted. The uncontradicted evidence also showed that a single chain such as this ought to sustain four or five tons. The plaintiff attached the chain to the bar and then it was hoisted by means of a crane, the plaintiff steadying the bar with his hand. While he was doing this the link next to the hook broke, and the plaintiff was hurt. The broken link was bent, but the plaintiff testified that it was clear of the edge of the bar, and the plaintiff's expert testified that if it had not been defective it would not have broken even if it was against the edge.

The link that broke was made in the defendant's works by a fellow servant with the plaintiff. There was evidence tending to show that it had not been used much, but was defective and crystallized because made of old instead of new iron, and that it should have been made of new. Whether the use of old instead of new iron was due to the indolence of the smith who made the link, or to a failure of the defendant to furnish new iron of convenient size, it is perhaps unnecessary to inquire.

The defendant seeks to bring itself within *Johnson v. Boston Tow-Boat Co.* 135 Mass. 209, and that class of cases. As a preliminary it argues that there were several chains including the stronger double ones, that the selection was not its business, which is true, and that if the plaintiff chose to take a single one

it was his negligence. As to this contention it is enough to say that on the evidence as we have stated it the defendant got all its rights if it was allowed to argue this point to the jury in the teeth of all the testimony in the case. But the defendant's main contention is that, if the plaintiff was justified in taking the chain that he used, the defendant did all that it was bound to do when it furnished a competent smith with sufficient materials, and that making a link was one of those transitory adjustments which the defendant had no personal duty to see carefully performed. The judge was right in ruling the other way and making the defendant personally responsible for the use of due care in preparing a safe appliance for the plaintiff's use. The chain was a permanent instrumentality, intended and provided for the very purpose for which it was used when it broke. The plaintiff was not applying it to a special, temporary use which might have been in excess of even its expected powers. *Harnois v. Cutting*, 174 Mass. 398. The chain was not one of those small things that would be going through a rapid course of wearing out and replacement, as to which it might and would be left to the judgment of the plaintiff and his fellow servants to decide, when one was to be discarded, so long as the defendant kept a stock of sound ones within reach. *Miller v. New York, New Haven, & Hartford Railroad*, 175 Mass. 363. *Harnois v. Cutting*, 174 Mass. 398. This was a more important matter. In a practical and business sense the chain used was, or might be found to have been, the only one within reach. It was not worn out, but broke in consequence of inherent defects that could and should have been avoided in the manufacture, and that could not be found out later. As to permanent appliances in general, of course the fact that the proximate cause of the damage was the negligence of a fellow servant in making them is no defence. *Ryalls v. Mechanics' Mills*, 150 Mass. 190, 194.

It is argued also that the plaintiff did not use due care. As to his not getting a double chain enough has been said. So far as could be told by inspection this chain was as good as any other single chain. Moreover it was the only one conveniently accessible. It is complained that the plaintiff did not use a tag rope, but, apart from the evidence that there was no tag rope there,

there was evidence that the way adopted by the plaintiff was the only practicable way of doing just what the plaintiff was ordered to do. The fact that a plaintiff was under a suspended weight which would crush him if it fell does not establish negligence as matter of law in all cases. *Spicer v. South Boston Iron Co.* 138 Mass. 426. *Graham v. Badger*, 164 Mass. 42. In this case the plaintiff would have been safe if the link had been made of new iron, as on the plaintiff's evidence it should have been.

The defendant excepted to the statement by the judge in his charge that there was no evidence which showed, or had to his mind any tendency to show, that there was any neglect on the part of the plaintiff in the selection of this instrumentality. As we have said, this was a perfectly correct statement of the testimony so far as expressly directed to that point, and we do not think it necessary to say more than that the judge immediately added that that of course was a question for the jury upon all the facts. He recurred to and reinforced the same instruction later.

A similar answer may be made to an exception to the judge's saying to the jury that no evidence had been introduced to his recollection that there was any other tag rope on the premises, apart from the one belonging with this apparatus in use by the plaintiff, as to which it was in dispute whether the rope was there or in condition to be used. The whole matter was left to the jury. Moreover a judge has a perfect right, to say the least, to state his memory of the evidence to the jury. *Sewall v. Robins*, 139 Mass. 164, 168. *Porter v. Sullivan*, 7 Gray, 441, 449. We have examined all the exceptions and the defendant's brief, but do not find anything further that calls for special remark.

Exceptions overruled

W. H. Moody & J. H. Pearl, for the defendant.

J. J. Flaherty & S. T. Sears, for the plaintiff.

JOHN D. LORDEN vs. PATRICK COFFEY.

Suffolk. March 7, 1901. — April 4, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

A valid assessment for the laying out of a new street is a breach of the covenant against encumbrances in a deed given after the street was laid out but before it was constructed and the assessment made.

St. 1892, c. 418, § 8, amending St. 1891, c. 823, § 15, in regard to assessing upon adjoining parcels of land the cost of new highways laid out by an order of the board of street commissioners of Boston under those statutes, provides that the "assessable cost of the work done under said order shall be assessed upon the several parcels of land" and that the amount for which each parcel shall be liable shall be determined by the street commissioners "in accordance with the proportions in which said board shall determine that the said parcels of land are increased in value by the aforesaid order and the carrying out thereof." *Held*, that this section is unconstitutional, as under it the whole assessable cost is to be paid by the adjoining estates and this may be greater than the benefit to the property assessed. The provision for the proportional distribution of the tax among the different parcels does not prevent the total assessment from exceeding the total benefit.

CONTRACT upon the covenants against encumbrances and of warranty in a deed given by the defendant to the plaintiff June 20, 1896, conveying certain premises on Burbank Street in Boston. Writ dated August 4, 1900.

At the trial in the Superior Court, before *Gaskill, J.*, it appeared, that on April 2, 1896, the board of street commissioners of the city of Boston issued an order, to give notice, that the board was of the opinion that public necessity and convenience required that Burbank Street be laid out as a highway with the name of Fenelon Street, and constructed by grading and covering; and that they intended to take the action required for this purpose by the provisions of St. 1891, c. 323, and acts in amendment thereof. A copy of this notice was published in two Boston newspapers on April 3, and April 9, 1896, and on June 2, 1896, the board ordered, that Burbank Street be, under the provisions of St. 1891, c. 323 and acts in amendment thereof, laid out under the name of Fenelon Street, and ordered the construction of the highway of a width of forty feet with

gutters, cross walks, sewers, catch basins, and house and gas connections.

After the passage of this order and after the giving of the deed, the street was constructed in accordance with the order. On December 22, 1899, the board of street commissioners passed an order, that they, acting under the provisions of St. 1891, c. 323, and acts in amendment thereof, thereby determined the assessable cost of laying out and of work done in construction of Fenelon Street, under their order of June 2, 1896, to be \$2,823. 97, and thereby assessed said assessable cost on the several parcels of land thereafter specified, and under this order the board assessed upon the property conveyed by the defendant's deed the sum of \$203.25. On July 31, 1900, the plaintiff, after demanding that the defendant pay it, paid this assessment with interest to the city of Boston.

On the foregoing facts the defendant requested the following rulings:

1, 2 and 3. St. 1891, c. 323, in its provisions for assessment of cost of street construction upon abutting estates is unconstitutional and void, in itself and as amended by St. 1892, c. 418, and St. 1896, c. 236.

4 and 5. The assessment in the case at bar and the order for the construction of Burbank Street, being under a statute unconstitutional and void in its provisions as to such assessment, constituted no lien or encumbrance upon the property conveyed by the defendant to the plaintiff.

"6. The question of the extent of the defendant's liability under the covenants in his deed to the plaintiff must be determined under the laws in force at the date of the deed, and cannot be affected by St. 1899, c. 433, passed subsequent to the date of such deed.

"7. Actual construction of the street is the basis of the right to assess betterments or cost as betterments. Such construction postdating the defendant's deed, the plaintiff can recover only nominal damages.

"8. The validity of the order of the Street Commissioners of June 2, 1896, as a basis for subsequent assessments or betterments must be tested by the laws in force at the date of the first publication, April 2, 1896.

"9. If the assessment was made by virtue of or in compliance with the provisions of St. 1899, c. 433, the defendant is not liable in this action."

"13. Upon all the evidence in the case, the plaintiff is not entitled to recover."

The judge gave the instructions 6 and 8 and refused to give the other instructions requested by the defendant, and instructed the jury that the assessment and the law under which it was made were constitutional and valid. To this instruction and to the refusals to rule the defendant excepted.

The jury found for the plaintiff in the sum of \$214.75; and the defendant alleged exceptions.

W. Bolster, for the defendant.

J. D. Thomson, for the plaintiff.

HOLMES, C. J. This is an action on the covenant against encumbrances in a deed conveying land on Burbank Street in Boston. A few days before the date of the deed the street commissioners had ordered that the so called street should be laid out as a highway under St. 1891, c. 323, as amended by St. 1892, c. 418. After the date of the deed the street commissioners determined the assessable cost which subsequently the plaintiff paid. It is not denied that the lien for this cost was an encumbrance (*Blackie v. Hudson*, 117 Mass. 181,) if the statute under which it was assessed is constitutional, and the case comes here on exceptions to a refusal to rule that the act is void. No other question is argued.

By St. 1892, c. 418, § 8, the assessable cost of the work is made a lien upon the land without personal liability, and the amount for which each parcel shall be liable shall be determined by the street commissioners "in accordance with the proportions in which said board shall determine that the said parcels of land are increased in value by the aforesaid order and the carrying out thereof." It is argued that, although the cost is to be divided among the estates liable in proportion to the benefit, the cost may be greater than the benefit, and that therefore an attempt to charge it all unconditionally to the benefited estates is void under recent decisions. *Dexter v. Boston*, 176 Mass. 247, 251.

We are of opinion that the argument is sound, and that the

statute cannot be sustained. At first we had the impression that the required proportion to the increase in value could be construed to save it, as the word "proportional" was deemed sufficient to save St. 1899, c. 450, § 3. *Hall v. Street Commissioners*, 177 Mass. 434. But the statute of 1899 simply fixed a maximum of not more than four dollars per linear foot as the sum which was to be charged in proportion to the benefit received. Under the statute before us the whole assessable cost is to be paid by the adjoining estates. "The said assessable cost of the work done under said order shall be assessed upon the several parcels of land," St. 1892, c. 418, § 8, or as it read before amendment, "The said assessable cost . . . shall be repaid with interest to the city, by the owners of the several parcels of land." St. 1891, c. 323, § 15. There is no escape from the construction that the whole assessable cost is to be paid. What this cost is is defined in St. 1892, c. 418, § 7. It includes the expenses of taking land and all the main items to be expected. Plainly it may be greater than the benefit to the adjoining estates. The proportion in which the board shall determine that the parcel of land is increased in value determines the amount for which each parcel is to be liable, it is true, but as the total cost is to be divided among the several parcels, there is no chance to read the reference to this proportion as implying that the charges shall not be more than the benefit. The only effect which it can have is to determine the distribution of the tax among the different parcels which collectively must pay the whole. We are unable to construe the statute in such a way as to make it consistent with the Constitution.

Exceptions sustained.

GEORGE H. BURT & another vs. NATHANIEL F. TUCKER.

Suffolk. March 12, 1901. — April 4, 1901.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Seem, that the right to use a word as a trade-mark does not depend on originality even as against the originator of the peculiar use. Per HOLMES, C. J.

A manufacturer of shoes in Massachusetts adopted a label with the word "Knickerbocker" as a general mark for his goods or a large variety of them, although he also used other marks for goods made to order for particular firms. Two years later his factory was burned, and he went out of business and for four years was in the employ of others as a salesman in other States. At the end of that time he resumed business for himself in Philadelphia selling the goods of a New Jersey company as a jobber, adopted the title "Knickerbocker Shoe Company" and used the word "Knickerbocker" on his packages with a label similar to the one he formerly used. He testified that he never had intended to abandon the use of the word "Knickerbocker" as a trade-mark regarding it as a valuable possession and that he resumed it at the first opportunity. During the four years that this former manufacturer was working for others, the word "Knickerbocker" had been adopted as a trade-mark by another manufacturer of shoes. In a suit brought by the last named manufacturer against the first named for alleged infringement of his trade-mark, it was *held*, that the judge who tried the case was warranted in finding, that the defendant had made the word "Knickerbocker" a trade-mark, that he had not abandoned it, and that his present use of it was within the scope of his original acquisition.

BILL IN EQUITY by copartners engaged in the manufacture and sale of boots and shoes, to restrain the defendant from using their trade-mark consisting of the word "Knickerbocker" as applied to boots and shoes, filed November 27, 1900.

The case was heard in the Superior Court, by *Mason*, C. J., who made the following note on the papers in the case: "The answer admitting so much of the plaintiffs' case as to rely wholly on the matter alleged in avoidance, the defendant was directed by the court to go forward on the question of the prior ownership and abandonment."

Thereafter on December 12, 1900, the judge indorsed and signed on the back of the bill the following: "The pleadings admit many of the allegations of the plaintiffs' bill. Upon the matters which the pleadings leave in issue, the court finds the facts to be as stated in the defendant's answer, and directs a decree dismissing the bill with costs."

On the same day there was entered the following decree: "This cause came on to be further heard at this sitting on the pleadings and the evidence submitted by each party, and was argued by counsel, and thereupon, on consideration thereof, it is ordered, adjudged and decreed that the bill be dismissed with costs to be taxed by the clerk, and that execution issue therefor." From this decree the plaintiffs appealed.

The answer so far as it contained statements of fact was as follows:

"This defendant . . . admits that the plaintiffs have for some time past been engaged in the business of the sale of boots and shoes at retail, which shoes they have designated by the word 'Knickerbocker'; and further admits for the purposes of this suit that they have used a trade-mark, an essential feature of which is the word 'Knickerbocker,' substantially as stated in the plaintiffs' bill; and further admits, . . . that the plaintiffs have built up a substantial business in such sale of boots and shoes designated by the word 'Knickerbocker.' . . .

"The defendant denies that he has used the word 'Knickerbocker' in connection with his business for the purpose of falsely representing the boots and shoes sold by him to have been manufactured by, and to be the same kind, character and quality as those manufactured and sold by the plaintiffs; and further denies that he has, as in the plaintiffs' bill alleged, or otherwise, fraudulently undertaken to engage in the sale of boots and shoes with a purpose of depriving the plaintiffs of such legal rights, if any, as they may have to the use of the word 'Knickerbocker,' or any design or other designation which they may have used in connection with their business; and the defendant further denies that the trade-mark which has been used by the plaintiffs is valid or of any value, or that it entitles the plaintiffs to the use of the word 'Knickerbocker' in any form as against the defendant, for reasons stated hereafter in the defendant's answer.

"Further answering, this defendant says that in the year 1896, and for several years prior thereto, he was engaged in the manufacture of boots and shoes for misses' and women's wear under the name and style of N. F. Tucker & Co., in the city of Lynn, Massachusetts, and in the town of Middleton, Massachusetts, and for the purpose of advertising goods of his manufacture and in-

creasing the sale thereof, he, about the year 1894, caused to be made certain designs to be placed on his cartons or pasteboard boxes containing shoes of his manufacture, which said designs distinguished the shoes made by him as 'Knickerbocker' shoes, and included a sketch or design representing what was said to be the Knickerbocker arms or emblem together with the word 'Knickerbocker'; that after procuring said designs he caused to be printed therefrom labels for such cartons or pasteboard boxes in large numbers, and during said years sold to the trade in various parts of the country shoes put up in such boxes and so designated by labels, and that such label, including such design and the word 'Knickerbocker,' as aforesaid, was generally used by him during all of said years in connection with his said business of the manufacture and sale at wholesale of boots and shoes; that in the year 1896 he ceased to manufacture boots and shoes, and since said year has not, until about July or August of the present year, been engaged in the business of the manufacture and sale of boots and shoes on his own account, but has been employed by sundry manufacturers as a salesman; that in July or August of the present year he decided to engage in the jobbing of boots and shoes in Philadelphia, Pennsylvania, and purchased from certain manufacturers boots and shoes to constitute his stock in trade for such jobbing business, and upon receiving shoes so purchased by him he caused the same to be labelled on the cartons or paper boxes, on the ends thereof, with labels bearing the same design as that used by him in 1896, and previously as aforesaid, said labels so used by him in the present year being identical in design with those previously used, the only difference being that the labels previously used were printed in colors, while the style for such labels having changed, those used in the present year have been printed in plain black, and are smaller in size than those formerly used; that when he caused said design to be made and said labels to be printed, and used them as aforesaid in 1896, and prior thereto, he intended to, and did, adopt said design and labels as a trade-mark for his exclusive use in designating and distinguishing boots and shoes of his manufacture; that said design and label so adopted were used by him generally and regularly in his business until he discontinued business in 1896, and this adoption and regular use took place

long before the word 'Knickerbocker' was used by the plaintiffs in their business; that when he discontinued business in 1896 he did not intend to abandon said design and labels, or his right to the same, and did not use them from 1896 to July or August, 1900, because he was out of business, as aforesaid, and that immediately upon resuming business he resumed the use of said design and labels."

In addition to the facts stated in the answer the record set forth oral testimony of the defendant and other witnesses. The defendant in the course of his testimony was asked the following questions to which he gave the following answers:

"Q. Whether or not you continued to use that label [with the word 'Knickerbocker'] until you discontinued business, until the fire? A. Yes, sir. — Q. How generally did you use it? A. Well, we used it very largely in the jobbing trade in New York, and to our general retail trade through the West, through the Middle States and the West."

"Q. Now you say from July, 1896, to until July, perhaps, or August, 1900, you were not in business for yourself? A. No. — Q. And you opened business in Philadelphia in August, 1900? A. Yes, sir. — Q. And you then purchased shoes of whom for your business? A. The Newton Shoe Co. — Q. And did you open a store in Philadelphia? A. I did. — Q. Did you put up any sign? A. Yes, sir. — Q. What sign? A. Knickerbocker Shoe Co. — Q. And were any of the shoes as you received them from the Newton Shoe Co. labelled in any way or designated? A. They were not. I labelled them after I received them."

"Q. Now, come back to the Philadelphia business. Will you state whether or not, when you discontinued business in 1896, you abandoned or gave up the intention to use the label which you had used up to that time, this label which you exhibited? (*Objected to, admitted.*) A. No, it had become altogether too valuable a trade-mark for me to abandon, and I resumed it at the first opportunity. — Q. Will you now state why, from July, 1896, to July, 1900, you did not use it? A. I was out of business and unable to use it."

"Q. I will ask you this other question which was objected to, whether between July, 1896, and your resumption of business, when you used the labels which you used this year, you at any

time abandoned or in any way abandoned the use of that label?
A. No, sir; I held it as a valuable possession."

On cross-examination the defendant was asked among others the following questions which he answered as follows:

"Q. How many different kinds of lasts were there? A. Five or six different ones; I don't recollect. The name 'Knickerbocker' did n't describe any distinctive style of shoe. We made a wide range of shoes under the general name of the Knickerbocker shoes."

"Q. And you used, I suppose, Mr. Tucker, a number of trade-marks, didn't you? You would call them trade-marks?

A. Yes. — Q. You designate them by different names at different times? A. Yes, sir. — Q. How many names do you recall

that you used in making and sending out and selling your shoes? A. One of our leading lines was the Excelsior line, the line

which I am using to-day, Excelsior shoes. I am using the same to-day. The other was the 'Knickerbocker' which I am also

using to-day. There was one special one made for Winch Brothers, 'Little Drummer.' That is all that survived. Whether

there were any others I am not entirely sure."

"Q. Do you recall the Continental? Did n't you use the Continental? A. Yes, sir. Made lots of those for Lamkin & Foster.

— Q. A lot you marked 'Continental'? A. Yes, sir. — Q. How about Argyle? A. Made those for Clark & Hutchinson. —

Q. You made some marked 'Argyle'? A. Yes. — Q. How about Ashley? A. I never used the term to the best of my knowledge

and belief, never did. — Q. Gascogne? A. I am not sure about that. — Q. Viscol? A. I am not sure about that. It was the

custom of dealers then to prescribe labels for goods. I don't know whether they did or not."

"Q. How did you get the word 'Knickerbocker School Shoe'?

A. I went to the Boston Bank Note Company and told them I wanted a design. At that time Batchelder & Lincoln were run-

ning heavily on our Excelsior line of goods and they wished us to confine the use of that label to them, so I was obliged to seek

another general label for my trade, and I thought that the Knickerbocker — it occurred to me it was a pretty good name.

I went to the Boston Bank Note Company and asked them what shape they could put that into. I wanted it especially adapted

to any New York trade. I thought it was a good name for the New York. They brought me a design, saying to me this was the old Knickerbocker arms, and they brought in the design practically as adopted. I thought it was a good thing and I adopted it and paid them for it."

"Q. Now when parties would write to you and order shoes they would ask you to put on those shoes certain names, and among them would be the name 'Knickerbocker'? A. I don't know that anybody ever did. I think not. I pushed my own goods and pushed the name. I was anxious to have that name used. — Q. Those goods were also marked other names, were they not? A. What goods do you refer to? — Q. What you call the Knickerbocker School Shoe. A. There was no distinctive Knickerbocker shoe."

"Q. Now, Mr. Tucker, you gave up business entirely along about the middle of 1896? A. On account of the burning of the factory. — Q. The factory burned and you went out of business entirely? A. Yes, sir. . . . — Q. And then what did you do? A. I went to selling goods for various parties on commission until I could get things in position to begin business again on my own account. — Q. You have been engaged as a salesman for the last two years, have you, for the Newton Shoe Company, Newton, N. J.? A. Yes. — Q. Why did you make a search and examination of the records to find if the name 'Knickerbocker' had been used by any other party if you were entitled to the use of it? A. Because I was going — I thought I saw an opening to sell two lines of goods at a certain price, of a certain kind. I gave these two lines of goods my old trade-marks, 'Excelsior' and 'Knickerbocker,' knowing that they would be valuable to me, because I was very well and favorably known in the trade by goods which I had manufactured under those names I adopted. My first arrangement I thought I would call myself the Excelsior Shoe Co., as the Excelsior was the highest price shoe I was going to put out, but I found before I got far in it, that there was a concern, an Excelsior Shoe Company, doing business in Portsmouth, Ohio, which, of course, precluded the use of the term. Then I made a thorough search, as far as I was able, to find whether anybody was doing business under the style of the Knickerbocker Shoe Co. I was told there was a concern

in Baltimore who had been doing business under the name of the Knickerbocker Shoe Co. I made considerable effort to find them, but they were not in existence, and I found they were not in existence then at the present time, and so I adopted that name as the name under which to do business."

"Q. Did n't you know that in Lynn there was a factory manufacturing Knickerbocker shoes? A. No, sir; not until after I had my printing out."

A. P. Browne & N. F. Hesselstine, for the plaintiffs, contended, that the use of the word "Knickerbocker" by the defendant before the plaintiffs adopted it was not as a trade-mark but merely as an advertising device, and that, if the defendant had a trade-mark, he used it only in the business of manufacturing shoes, and that when his factory was burned in 1896 he went out of that business and never resumed it, and that in 1900 when he became a jobber to sell shoes his old trade-mark had been abandoned, and, even if it was not abandoned, he had never acquired the right to use it in selling as a jobber shoes manufactured by others.

S. L. Whipple & G. F. Bean, for the defendant.

HOLMES, C. J. This is a bill to restrain the infringement of an alleged trade-mark consisting of the word "Knickerbocker," as applied to boots and shoes. In the answer a prior use and acquisition of the trade-mark by the defendant is set up. The case is here on the evidence, by appeal from a decree of the Superior Court dismissing the bill, after a finding that the facts were as alleged in the answer.

In considering whether the defence is made out, of course we shall assume in favor of the finding that the defendant was an honest witness, as he had every appearance of being, so far as the printed answers go. It was admitted in the argument before us that the defendant was the first to use the word. It would have to be admitted also that when he resumed the use he did so in ignorance of what the plaintiffs had done in the meantime, so that in its dramatic aspect the case for the defendant is pretty strong. The plaintiffs, however, deny that the defendant ever did more than to use the word as an advertising device, and insist that if he did get a trade-mark it was abandoned as matter of fact and of law, and further that the defendant now is making

a use of the word not within the scope of any right which he may have acquired.

We assume in favor of the plaintiffs that they might be entitled to prevail notwithstanding the fact that the defendant first used the word in its present connection, and that the right to a trade-mark does not depend upon originality, even as against the originator of the characteristic use. *Menendez v. Holt*, 128 J. S. 514, 521. *Royal Baking Powder Co. v. Raymond*, 70 Fed. Rep. 376. We therefore assume that the points toward which the plaintiffs have directed their argument are the points necessary to be considered, and that what we have called the dramatic aspect of the facts is not conclusive of the equities upon which the decision of the case must turn.

In the first place then it is to be considered whether the defendant ever had a trade-mark. Upon this question the finding of the Superior Court seems to us fully warranted by the evidence. From 1894 to 1896 the defendant used the mark, very largely, as he says, in the jobbing trade in New York and in the general retail trade, especially through the middle states and the west. He used it not to designate a particular style of shoe, but to cover a wide range of shoes which he manufactured and sold. It is true that he also used other names, but most of them were used for the special goods of particular houses only, and one which was started for general use, "Excelsior," became appropriated to a single firm. Without intimating that a man could not have more than one trade-mark for his boots and shoes, we are of opinion that the judge was warranted in finding that by the course of the defendant's business "Knickerbocker" became his general mark for his goods, or for a large variety of them.

There is more difficulty on the question of abandonment, but in view of the testimony of the defendant we are not prepared to say that the finding of the Superior Court was wrong. If we should adopt the plaintiffs' contention that the defendant's intent is immaterial, then the question would be whether, from lapse of time, or the public abandonment of his business, or from other causes, the good will associated with the name had melted away, either gradually or at once. In July, 1896, the defendant's factory in Massachusetts was burned and he went out of busi-

ness. From that time until July or August, 1900, he worked for others as a salesman in other States. During those four years of course he made no use of his trade-mark. Then he began business again on his own account in Philadelphia, selling goods of a New Jersey company as a jobber, and then he resumed the use of the name on his packages, adopting it as a title for his concern, "Knickerbocker Shoe Company." Certainly it is hard to believe that a name which had not been more or longer associated with the defendant's goods than this had been still should have value from any good will once attached to it. But the defendant testified, at least by implication, that it did, and the extent to which his testimony should carry credence is a matter on which we cannot undertake to revise the opinion of the judge who saw him. *Royal Baking Powder Co. v. Raymond*, 70 Fed. Rep. 376, 380. *Mouson v. Boehm*, 26 Ch. D. 398. *Julian v. Hoosier Drill Co.* 78 Ind. 408, 412. *Browne*, Trade-marks, § 680.

It may be argued that there is another aspect of the facts just stated, also irrespective of intent. It may be contended that discontinuing the use of the trade-mark, at least when coupled with abandonment of the business, amounts to a notification of the public that any one is free to use the mark, and that the defendant cannot go behind the import of his acts after the plaintiffs have taken up the use, although the old good will still attaches to the name, whatever the private intent of the defendant may have been. But it is plain that there is no such meaning^a absolutely attached to a discontinuance of use, and it seems to us that even when the business also is discontinued, it is not a necessary conclusion that the use of the mark at once is free to all. Or, at least, to put it more cautiously, whatever rights may have been gained by the plaintiffs if they used the mark in good faith in the interval of discontinuance, the defendant still may be entitled as against them to resume his use. *Mouson v. Boehm*, 26 Ch. D. 398, 407, 408. *Levy v. Waitt*, 61 Fed. Rep. 1008. *Julian v. Hoosier Drill Co.* 78 Ind. 408, 412.

In the cases and text-books intent is assumed to be important. *Browne*, Trade-marks, § 681. Perhaps it might be so as giving a character to the ambiguous fact of discontinuing the use of the mark. Perhaps if the use were given up with the intent never to resume it, that would amount to an offer of it to the public

which any one might accept at once, although giving up the use with intent to resume would not have that effect. If this should be so, and if a trade-mark may be lost under such circumstances before the vanishing of the good will associated with it, here again it is something of a stretch to believe that the defendant, during the four years that he was a salesman, continuously intended to resume business on his own account and again to use the name. But it is perfectly possible, he says that he did, and the Superior Court has found accordingly, and in this matter also we have no sufficient ground for going behind its view of the facts.

Finally, the plaintiffs argue that the defendant is attempting to make his old trade-mark cover a new meaning, as well as to change its form. It was used on shoes manufactured by him in Massachusetts, and seems in fact to have been confined mainly to shoes for young people, in connection with the word "School" ("Knickerbocker School Shoes"). It now is used upon shoes made by another firm in New Jersey and sold by him in Philadelphia. It is pointed out also that he has taken his word into his business and dropped "School" altogether. Again we have to fall back on the findings. We cannot say that the judge was not warranted in finding that the word originally indicated the source from which the shoe was recommended, rather than that of its manufacture, — a judgment of excellence which more or less commends itself to buyers. If so, it might be found that the present case is like the former in its characteristic features, and if that were found and it were established that the defendant could use the trade-mark on the shoes which he intended to sell, we see no ground on which the plaintiffs could prevent his incorporating the same word into his business name.

It will be seen that we nowhere undertake to say what our decision would have been on the printed evidence had it come before us in the first instance. We confine ourselves according to the settled practice to considering whether we can say that the judge who saw the witnesses necessarily was wrong upon matters which depended very largely on the degree to which they were believed.

Bill dismissed.

WILLIAM H. BARKER vs. BOSTON ELECTRIC LIGHT
COMPANY.

Suffolk. November 15, 1900. — April 8, 1901.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

In an action by a lineman in the Boston fire alarm department against an electric lighting company, to recover for injuries caused by a wire of the defendant upon a pole of the defendant which the plaintiff was climbing for the purpose of repairing a fire alarm wire, it appeared, that the pole was in a reservoir lot placed there by the defendant with the permission of the water department of Boston, that the lower cross bar on the pole was used for the wires of the defendant and the upper cross bar belonged to the city of Boston and had two fire alarm wires attached to it. The evidence tended to show, that there was a general interchangeable use by the defendant and the fire alarm department each of the poles and fixtures of the other, that in every case the party desiring to make use of a pole of the other not in a public street would apply for a permit and that nothing ever was paid by either party to the other for such permit or use. It did not appear to what extent, if any, applications by either party to the other were refused, save that the city had in some cases imposed restrictions. Except as above there was no evidence of any contract or agreement between the city and the defendant as to the interchangeable use above mentioned or as to this particular pole. *Held*, that a jury would be warranted in finding that there was a general understanding and agreement between the parties that each should use the poles of the other and that the permits from time to time were granted in pursuance of such an agreement, and, if so, the plaintiff in going upon the pole was not a mere licensee, but the defendant was bound to use reasonable care for the protection of those members of the fire alarm department who had occasion to go upon the pole. *Held, also*, that whether the defendant was negligent as against the plaintiff, and whether the plaintiff was in the exercise of due care or assumed the risks, were questions for the jury.

Whether a violation of the provisions of St. 1890, c. 404, § 1, by insufficient insulation of an electric wire at the point of attachment to its support, gives a person injured by such wire a right of action by virtue of the statute, *quære*.

TORT by a lineman in the Boston fire alarm department to recover for personal injuries alleged to have been caused by his receiving a shock from an electric light wire belonging to and controlled by the defendant upon a pole of the defendant which the plaintiff was climbing for the purpose of repairing a fire alarm wire. Writ dated July 15, 1898.

The declaration as amended contained two counts. The first count, setting forth the facts, alleged that the plaintiff was in the employ of the city of Boston and went upon the pole in the

discharge of his duties and while rightfully there and in the exercise of due care was injured by reason of the improper and negligent manner in which the electric wire and the arm to which it was attached were maintained by the defendant. The second count contained the additional allegation, that the injury occurred on account of the defective and insufficient insulation of the defendant's wire at the point of attachment to the support, as required by St. 1890, c. 404, § 1.

At the trial in the Superior Court, before *Braley, J.*, the case principally turned upon the question whether the plaintiff was a mere licensee or whether the defendant was bound to use reasonable care for the protection of those members of the fire alarm department who had occasion to go upon the pole.

The evidence upon this point is fully stated in the opinion of the court. At the close of the evidence on both sides, the defendant requested a ruling, that upon all the evidence the plaintiff could not recover, and the judge so ruled and directed the jury to return a verdict for the defendant. The jury returned a verdict as directed; and the plaintiff alleged exceptions.

R. F. Sturgis, for the plaintiff.

C. A. Snow, for the defendant.

HAMMOND, J. At the time of the accident the plaintiff was lawfully upon a pole owned by the defendant, and the main question is whether, being there as an employee of the fire alarm department of the city of Boston, he was a mere licensee.

The pole was the fifth of a line of five poles belonging to the defendant, all located upon the reservoir lot owned by the city of Boston and abutting on a public way called White Street in that part of the city called East Boston. The poles were just within the fence separating the sidewalk of the street from the reservoir lot, and were erected in July, 1886, by the Citizens Electric Light Company, the predecessor in title of the defendant, in pursuance of a license from the water board of the city, which reads as follows: "Voted that the petition of the Citizens Electric Light Company for permission to locate poles on the edge of the Reservoir lot in East Boston be granted, in accordance with the recommendation of the Engineer."

The defendant is a corporation engaged in the manufacture and supply of electricity for light and power throughout the

city, and for its transmission and distribution maintains lines of wires of which some are attached to cross arms upon poles in the public streets, some are carried in conduits under streets, some are attached to various kinds of support on roofs of buildings, and in a few instances some, as in this case, are attached to poles erected upon property of the city. In 1890 the defendant became the owner of all the poles and lines of wires of the Citizens Electric Light Company, and has ever since maintained them. Upon this fifth pole there were two arms or cross bars each about five feet long. To the lower arm which belonged to the defendant were attached its wires with certain insulating contrivances. The wires came from the other four poles upon the reservoir lot to this pole, and then ran obliquely across White Street to an arm belonging to the defendant company and attached to a pole of the fire alarm department, which was placed in the sidewalk of the street. Ever since it became the owner of the pole the defendant has maintained the cross bar and the wires attached in the manner above stated without objection from the city or any of its agents.

The upper arm of the pole belonged to the city of Boston, having been placed there in December, 1887, by the fire alarm department, and to it were attached two fire alarm wires. These wires came across from the other side of White Street to this arm, and from there led down to two hooks on a small cross piece below the cross bar of the defendant, and from these hooks passed into a lead pipe and through the pipe to a fire alarm box affixed to the pole and projecting over the top of the street fence, so that a person standing upon the sidewalk could use the box. This short cross piece, the lead pipe and the box, all belonged to the fire department, and had been attached by it to the pole. The above arrangement of the wires, cross bar, small cross piece, lead pipe and box had existed and had been used by the fire alarm department ever since December, 1887, without objection from the defendant, so far as appeared. The wires of each party were so affixed to the cross bars and pole as not to touch or interfere with the wires of the other in their usual and intended position.

The Citizens Electric Light Company, referred to above, was organized December 4, 1885, and acquired the property in East

Boston of the Union Electric Light and Power Company, a Maine corporation, which was the first company to erect electric light poles and fixtures in East Boston.

Subject to the defendant's exception the plaintiff put in evidence three separate orders of the mayor and aldermen of the city, dated respectively June 24, 1884, December 8, 1886, and November 13, 1888, granting permission to the defendant or its predecessors in title to erect poles for the support of wires in certain public streets, therein respectively named, in East Boston. The aggregate number of poles authorized by these orders was two hundred and thirty-one, and each order contained the following condition: "Also, upon condition that any department of this city shall have the exclusive use of the upper cross bar and top of each pole free of cost, for the purpose of placing wires thereon." The plaintiff also introduced in evidence an ordinance of the city passed in 1890, which has been in force ever since, providing that the superintendent of streets, when thereto authorized by an order of the board of aldermen, should issue permits to persons to open and occupy portions of the streets for the purpose of placing and maintaining poles therein for the support of wires; that the grantee of such permit should allow the departments of the city the exclusive use of the upper cross bar and top of each pole, free from all charge, for the purpose of placing wires thereon, and should not suffer or permit any person to place or keep wires upon its poles or fixtures without permission first obtained in writing from the board of aldermen. It was conceded that these three orders and the ordinance applied only to poles in the public streets.

One Mills, an employee of the defendant and called by it, stated on cross-examination that as respects poles to be erected in the streets the fire alarm people as a rule did not put their arm on a pole before it was set, but "a gain is left in the top of the defendant company's poles for the fire alarm people, as a general thing, every time a pole is set; that in every pole set there is a mortise cut in the pole for a fire alarm arm, and that is what it is intended for, and that is true of nearly all the poles that are set." He further stated that only a very few poles of the defendant company are on private land.

The plaintiff testified that he was familiar with the use of

poles and fixtures of different companies, and that prior to the accident and since, he had seen wires of the defendant company attached to roof standards owned by the city and run by the fire alarm department, and also upon poles of the fire department in the streets.

Without going further into detail it is sufficient to say that the evidence tended to show that the defendant had many more structures, especially upon buildings, than the fire alarm department; that there was a general interchangeable use by the defendant and the fire alarm department, each, of the poles and fixtures of the other, and that this use was not confined to poles set in the streets; that in each individual case the party desiring to make use of a pole of the other would apply for a permit covering that case, except that the fire alarm department did not ask permission to use a pole of the defendant set in the public street; and that nothing was ever paid by either party to the other for such permits or use. It did not appear to what extent, if any, applications by either party to the other for permits were refused, save that the city had in some cases imposed restrictions.

As to this particular pole no witness could recollect any application for permission to put the fire alarm wires upon it, but the superintendent of that department testified that when he found that he needed to attach the department wires to a pole it was his custom to ask the company's permission to put the wires there, and that he had no recollection about this pole; he supposed that he followed his usual custom with respect to it. He further testified that he had no recollection that he or his department had anything to do with the setting of this particular pole; that "he did not know anything, and had no reason to know, about what permission, if any, was obtained by the said company for the setting of the poles upon the land or premises of other city departments than his own, and that so far as the water board was concerned, he had no reason to know why, or how, or under what conditions, if any, in what form or manner, they granted permits for the use of their property for the setting of poles," and that he had nothing to do directly or indirectly with the granting of a license by the water board for the setting of this pole or any of these poles on the reservoir lot.

When asked whether or not his department was in any way consulted about it before it was done, he replied "that he was not clear as to that; that he was requested to move his box around from the section where it was formerly placed over on the other side of the reservoir lot, but that he did not know whether this was at the time the water board granted permission for the setting up of this pole or afterwards; and that they were also requested to take up the pole that they had around on the other side, and that he was perfectly willing to do it because it shortened the loop, and that that was all he knew about it."

Except as above stated, there was no evidence of any contract or agreement between the city and the defendant as to the interchangeable use above mentioned, or as to this particular pole.

What may be inferred fairly and legally from this evidence? Is it sufficient to warrant a finding that the right of the city to the use of the pole for its fire alarm department was something more than that of a mere licensee, and so understood by the parties?

So far as respects poles in the public streets it is clear that from the first the defendant and its predecessors in title accepted and acted upon permits to erect poles granted upon the condition that the city departments should have the exclusive use of the upper cross bar and top free of cost; and that to this end the poles were made with a mortise therein to receive this cross bar for such use. As to any such pole the company erected it under the condition that the city should use a part of it, and the pole was fitted for that purpose; and there can be no doubt that when the city comes to such a pole it comes not as a mere licensee but under a claim of right to which the company assents. It is to be noted, however, that the pole upon which the accident occurred was not in the public street but upon the private property of the city, and that the permit to erect it was granted not by the board of aldermen of the city acting as public officers under the statutes, but by the water board acting not as public officers but as the agents of the city. The permission under which the defendant uses this pole is the permission of the owner of the land, and in this respect the city stands like any private landowner. It can revoke the permit at any time if there be no contract or agreement express or implied to

the contrary. The vote of the water board was merely to the effect that the petition to locate poles be granted. It does not appear why these five poles which were placed upon the reservoir lot were not placed in the street close adjoining. They were erected in July, 1886, and in December, 1887, the wires and box of the fire alarm department were changed to one of them. Upon this pole from and after that time were wires of the company which came from the other poles upon the lot and crossed over to an arm of the defendant company attached to a pole of the city controlled by the fire alarm department and placed in the sidewalk of a public street; and there were wires of the fire alarm department which came from across the street. At the time the pole in question was erected, the policy of reserving the upper part for the fire alarm department had been begun, and the company which erected this pole had acted upon permits granted in accordance with that policy, and the evidence would warrant the inference that when this pole was put up it had the mortise in it for the upper cross arm afterwards placed upon it by the city.

It is true that permits were asked by each party of the other, except in the case where the city desired to use a pole of the company set in the public street, but we cannot consider that fact as decisively showing merely an interchange of courtesies, as contended by the counsel for the defendant. Considering the conditions annexed to the permissions granted to the defendant and its predecessors in title as to poles erected in the public streets, the facts that the policy of annexing such conditions had been adopted by the public authorities and that such permits had been received and acted upon by the grantee for some time before the vote of the water board as to the pole in question; that this pole was erected upon the private land of the city and was revocable at any time; that there is evidence warranting the inference that the mortise for the upper arm was upon the pole when it was erected; that in about eighteen months the city began to use it and has ever since continued such use; that the wires upon the pole are connected with the general systems of the defendant and of the fire alarm department; that there has been an interchangeable use by each party of the poles of the other, not only upon the public streets but

elsewhere, and especially upon this reservoir lot owned by the city; that no money ever was paid by either party to the other for this interchangeable use, and that no request to use a pole is shown ever to have been refused, we think that a jury, although not so compelled, nevertheless would be warranted in finding that there was a general understanding and agreement between the parties that each should use the poles of the other, and that while no money was paid to or by either to the other for such use, yet the consideration received by each is found in the right to a similar use of the poles of the other and in the nature of the right granted to erect the poles, and that the permits from time to time were not granted as interchanges of courtesies but in pursuance of such an agreement, and that the pole in question came within the scope of this agreement. We think therefore that the question whether the plaintiff was merely a licensee or not should have been submitted to the jury.

If the jury should find for the plaintiff as to these facts then the defendant was bound to use reasonable care for the protection of those members of the fire alarm department who had occasion to go upon the pole. *Illingsworth v. Boston Electric Light Co.* 161 Mass. 588.

The questions whether the defendant was negligent as against the plaintiff, and whether the latter was in the exercise of due care or assumed the risks, were also questions for the jury.

As the case must go back for a new trial, it does not seem necessary in the absence of any demurrer to the second count to decide in advance whether it is a statutory count, and if so whether it is maintainable as such. The issue of another trial may be such as to render that question immaterial.

Exceptions sustained.

FANNIE E. WOODS, executrix, vs. JOHN E. GILSON & others.

Middlesex. December 7, 1900. — April 8, 1901.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

A will contained the following provision: "I give and bequeath to my beloved wife E. G. the interest at four per cent of two thousand dollars during her natural life at her decease to be paid to my daughter F. W." The testator's wife survived him and died four months later. *Held*, that the wife's estate was entitled to receive the interest of \$2,000 at four per cent from the death of the testator, that the intention of the testator was to create an annuity of \$80 a year, and the wife's executors were entitled under Pub. Sts. c. 186, §§ 24, 25, to a part proportional to the time that she lived.

A will contained the following provision: "I give and bequeath to my daughter L. D. wife of W. D. the interest at five per cent of two thousand dollars during her natural life also one thousand dollars to be paid to her as her necessities may demand at her decease said amount to be equally divided among her children then living." *Held*, that the testator's daughter L. D. was entitled to an annuity of \$100 a year during her life, and, in addition, that the sum of \$1,000 was to be paid her from time to time as her necessities might require, that the last named sum was to be held in trust by the executor who was made trustee under the will, and that he was to judge of the necessities, subject to the rule that his discretion should be exercised fairly. Whether the words "said amount" in the gift over to the children of L. D. apply to the \$2,000 or only to such part of the sum of \$1,000 as may remain at the death of L. D., will not be considered under a bill for instructions until the contingency occurs.

A will contained the following provision: "I give bequeath and devise to my daughter F. W. wife of A. W. my home place and my meadow lot bought of J. P. after paying the legacy given in article second of this will to my daughter L. D. and also the interest to be paid to my wife mentioned in article first in this will." The testator had nine children. Other clauses of the will gave specific bequests and legacies to his sons and daughters, and the residue of his estate was to be equally divided between one of his sons and his daughter F. W. named above. The legacies provided by the second and first articles were life annuities respectively of \$100 and \$80 a year. The assets of the estate were more than sufficient to pay these legacies without resorting to the real estate named. *Held*, that the annuities were charges upon the home place and meadow lot devised to F. W. who was to take these parcels "after paying" these legacies.

A testator gave to his daughter M. S. a mortgage and note on a certain farm, called the Fletcher Farm, for \$2,500 and by another clause of his will gave the use and income of the Fletcher Farm above the mortgage given to his daughter, to his son, J. G. for life, with remainder to his children living at his decease. This mortgage and note were executed by the testator eight years before his death. The daughter was named in the mortgage as mortgagee and the note was payable to her. The testator after executing these papers had left them in the custody of a justice of the peace who drew them. Later he visited the justice and caused to be written upon the note the words "No interest to be paid until after my decease." After the testator's death the note and mortgage were found

in the possession of the justice. He gave them to the executor who delivered them to M. S. who had the mortgage recorded, knowing the facts above stated. *Held*, that the note and mortgage were not enforceable because without consideration and not delivered in the lifetime of the testator, but that the testator's bequest of his own invalid note was in effect a pecuniary legacy of the amount of the note, and that this amount was a charge upon the Fletcher Farm; therefore, that J. G. took the farm for life with remainder to his children, subject to a charge of the payment of \$2,500 to M. S.

A testator left to his wife "the interest at four per cent of two thousand dollars during her natural life at her decease to be paid to my daughter F. W." By another clause of his will he gave his daughter F. W. a certain parcel of land charged with the payment of the above named annuity to his wife. The wife survived him and died. *Held*, that F. W. was not entitled to anything under the first bequest, except to have her land exonerated from the charge imposed upon it in favor of the testator's widow, on paying the money found due to the widow's estate.

BILL IN EQUITY by the executrix of the will of John M. E. Gilson, late of Groton, for instructions, filed August 29, 1899.

The bill alleged, that John M. E. Gilson died on April 28, 1898, leaving a will dated February 5, 1895, which will was duly proved and allowed June 7, 1898; that by the will the testator appointed the plaintiff executrix in the following terms: "I do hereby nominate and appoint my daughter Fanny E. Woods to be executor of this my last will and testament and to hold in trust the amounts mentioned in one and two of this will for the benefit of my wife and daughter Lillian Drake and I authorize and empower her to sell and convey all my real estate"; that the plaintiff was appointed executrix of the will by the Probate Court and duly qualified as such; that the deceased left at the time of his death as his only heirs at law and next of kin the persons whose names and relationship are as follows: Lillian Drake, Mary E. Sears, Lucy E. Hynes, Fannie E. Woods, John E. Gilson, F. Earland Gilson, William M. Gilson and George H. Gilson, all children of the testator; that the widow, Elizabeth A. Gilson, wife of John M. E. Gilson, survived him and died August 9, 1898, leaving a will, and that her executors are named as defendants, and that, the children of the testator's son John E. Gilson are named as defendants, also the children of the testator's daughter Lillian Drake;

That the testator by the first clause of his will provided as follows: "I give and bequeath to my beloved wife Elizabeth A. Gilson the interest at four per cent of two thousand dollars

during her natural life at her decease to be paid to my daughter Fannie E. Woods”;

That the testator by the second clause of his will provided as follows: “I give and bequeath to my daughter Lillian Drake wife of Willie Drake of Fitchburg the interest at five per cent of two thousand dollars during her natural life also one thousand dollars to be paid to her as her necessities may demand at her decease said amount to be equally divided among her children then living”;

That the testator by the third clause of his will provided as follows: “I give and bequeath to my daughter Mary E. Sears wife of Philander Sears a mortgage and note on my Fletcher Farm for twenty-five hundred dollars”; that the testator at the time of his death and for many years before was seised in fee of a certain farm known as the Fletcher Farm, in Groton, the value of which, according to the inventory on file in the Probate Court is \$3,200; that on June 30, 1890, the testator made a mortgage and note for \$2,500 on the Fletcher Farm; that at the time the mortgage and note were executed they were left in the possession of the justice of the peace who drew them; that after the execution of the note and mortgage the testator visited the justice who had custody of the note and mortgage and caused to be written upon the mortgage note the following words: “No interest to be paid until after my decease”; that after the decease of the testator the note and mortgage were found in the possession of the justice who drew them and came into the possession of the plaintiff as executrix; that on June 25, 1898, the plaintiff delivered the note and mortgage to Mary E. Sears, and took from her a receipt; that thereafter Mary E. Sears caused the mortgage to be recorded; and that Mary E. Sears asserts that by the delivery to her of the mortgage and note she has a valid mortgage and note in accordance with the terms of those instruments; and she further asserts that, in case the mortgage and note are not valid in accordance with their terms, she has a valid claim as legatee for the sum of \$2,500 and interest to be paid by the executrix and to be charged upon the Fletcher Farm;

That the testator by the fifth clause of his will provided as follows: “I give and bequeath and devise to my son John E.

Gilson the use and income of my Fletcher Farm above the mortgage given to my daughter Mary E. Sears during his natural life at his death to be equally divided among his children then living”;

That the testator by the ninth clause of his will provided as follows: “I give bequeath and devise to my daughter Fanny E. Woods wife of Augustus Woods my home place and my meadow lot bought of Jane Pollard after paying the legacy given in article second of this will to my daughter Lillian Drake and also the interest to be paid to my wife mentioned in article first in this will”; that at the time of his decease and for many years before the testator was and had been seised in fee of the real estate mentioned in clause nine of the will, known as the home place and meadow lot: that it is a farm of about forty acres situated in Groton, and its appraised value, according to the inventory now on file in the probate court, is \$4,800;

That the testator by the tenth clause of his will provided as follows: “I give bequeath and devise all the rest and residue of my real and personal estate of every kind and description to be equally divided to my son Earland F. Gilson * and my daughter Fannie E. Woods wife of Augustus Woods”;

That the personal estate of the testator according to the inventory is \$18,593.38, and the real estate \$11,415, making a total of \$30,008.38.

The prayers for instructions were as follows:

“1. And the plaintiff prays to be instructed under clause one of said will what amount shall be paid, if any, to the executors of the will of Elizabeth A. Gilson; whether or not said amount shall be chargeable upon the real estate mentioned in clause nine; what sum of money is to be paid to the plaintiff under clause one; shall the same be paid from the residuary fund, or however else shall the same be paid?

“2. Under clause two shall a trust fund be created, and for how much? Who shall hold the same? Shall said trust fund be set apart from the residue of the estate, or how shall the same be raised? Who is to be judge of the necessities mentioned as a condition precedent to the payment of one thousand dollars therein named? What sum of money is to be paid to Lillian Drake when her necessities demand such payment, if

* *Semble* the same person as F. Earland Gilson.

ever, and until her necessities demand payment what shall be done with the trust fund, principal and interest, and how shall the same be raised?

"3. Under clause three whether the gift of a mortgage of twenty-five hundred dollars and the circumstances attending the same create a valid mortgage according to the language of the testator? Or whether the plaintiff shall pay to said Mary E. Sears twenty-five hundred dollars or any sum whatever? Is said mortgage or said sum of twenty-five hundred dollars chargeable upon the Fletcher Farm mentioned in clause five?

"4. Under clause five whether or not the mortgage given by clause three of said will is a valid encumbrance upon the property given to John E. Gilson by clause five? If it is, what is the legacy to John E. Gilson? If the court should decide that it is not, shall your petitioner sell said real estate and pay any sum or sums to Mary E. Sears, and pay any sum said farm might bring above said legacy to said John E. Gilson?

"5. Under clause nine, if the one thousand dollars mentioned in clause two should become payable, whether the same should be payable from the real estate mentioned in clause nine, or shall the same be paid from the residuary fund? How much and what parts (if any) of the bequests mentioned in clause two are chargeable upon the real estate bequeathed to the plaintiff under clause nine? Shall said bequests be paid from the residuary fund, or however else shall the same be paid?

"And the plaintiff further prays for such instructions as will enable her to execute the trust reposed in her by the eleventh clause of said will in a legal manner."

In addition to the facts stated in the plaintiff's bill which were admitted in the several answers, the following facts were agreed:

Subsequently to the testator's death and before the time when Mary E. Sears received the note and mortgage on the Fletcher Farm, she received a copy of the note and mortgage, and at the time of receiving the note and mortgage was informed that they had been in the custody of the justice of the peace who drew them, and had been by him delivered to the plaintiff; and that the will had been duly probated.

The case came on to be heard before *Holmes, C. J.*, who at the request of all the parties reserved it for the consideration of the full court.

S. K. Hamilton & T. Eaton, for the plaintiff.

J. S. Patton, for John E. Gilson.

C. F. Worcester & F. A. Fisher, for F. Earland Gilson.

G. A. Sanderson, for Mary E. Sears and Lillian Drake.

J. T. Joslin, guardian *ad litem*, for the minor children of Lillian Drake.

LATHROP, J. 1. The questions which first arise in this case are the amount payable to the executors of the will of Mrs. Gilson, under the first clause of the will, how this is to be paid, and whether it is a charge upon the real estate mentioned in the ninth clause of the will.

It is clear that under the first clause the executors of Mrs. Gilson's estate are entitled to receive the interest of \$2,000, at four per cent, from the death of the testator, April 28, 1898, down to the death of Mrs. Gilson on August 9, 1898. The intention of the testator was to create an annuity of \$80 a year, and the executors of the will of his wife are entitled to a proportionate part so long as she lived. Pub. Sts. c. 186, §§ 24, 25. These provisions were first enacted in 1848, and have been in force since. St. 1848, c. 810. Gen. Sts. c. 97, §§ 23, 24. See also *Towle v. Swasey*, 106 Mass. 100; *Adams v. Adams*, 139 Mass. 449; *White v. Stanfield*, 146 Mass. 424.

The question whether the sum due the executors of Mrs. Gilson's will is a charge upon the land conveyed by the ninth clause of the will may be more conveniently considered in connection with the next clause of the will.

2. Under the second clause of the will, we are of opinion that Lillian Drake is entitled to an annuity of \$100 a year during her life; (*Swett v. Boston*, 18 Pick. 123; *Brimblecom v. Haven*, 12 Cush. 511;) and, in addition, that the sum of \$1,000 is to be paid to her from time to time as her necessities may require. The annuity runs from the death of the testator, and may be paid in quarterly or semiannual instalments.

The sum of \$1,000, as will appear later, is to be held in trust, and this sum and the accumulated interest are to be paid to Mrs. Drake as her necessities may demand. Being in trust, we are of opinion that the plaintiff is the judge of these necessities, subject to the rule that her discretion is to be exercised fairly.

The question whether the amount to be paid to the executors

of the will of the testator's widow under the first clause of the will, and also the amount to be paid to Mrs. Drake under the second clause, may be paid out of the general assets of the estate, or are to be paid only out of the lands specifically devised to the plaintiff under the ninth clause of the will, is one of some difficulty. It is to be determined by ascertaining the intention of the testator as gathered from the entire will.

The ninth clause devises to the plaintiff "my home place and my meadow lot bought of Jane Pollard after paying the legacy given in article second of this will to my daughter Lillian Drake and also the interest to be paid to my wife mentioned in article first in this will."

Clauses three to eight give certain specific bequests and devises to his sons and daughters. The tenth clause gives the rest and residue of his real and personal estate, to be equally divided between one of his sons and the plaintiff.

We are of opinion that the gift to the testator's wife in the first clause of the will, and the bequest in the second clause are made by the ninth clause of the will a charge upon the home place and meadow lot therein devised to the plaintiff. She is to take these parcels of land "after paying" these legacies. *Taft v. Morse*, 4 Met. 523. *Henry v. Barrett*, 6 Allen, 500. *Fearing v. Swift*, 97 Mass. 413. *Frampton v. Blume*, 129 Mass. 152. *Thayer v. Finnegan*, 134 Mass. 62, where the cases on this subject are fully considered by Mr. Justice C. Allen. *Amherst College v. Smith*, 134 Mass. 543.

It is true that it is stated in the bill and admitted in the answers that the personal estate of the testator according to the inventory is \$18,593.88, and the real estate \$11,415, so that there are assets sufficient to pay the legacy; but we find no statement as to the value of the parcels described in the ninth clause of the will, nor of the value of the property at the time the testator made the will, more than three years before. The argument of the counsel for the plaintiff, founded upon what is said to be the value of the two parcels in the inventory, can have no effect.

Some question is raised as to whether a trustee should be appointed under the second clause of the will. The eleventh clause of the will, which nominates the plaintiff as executrix,

directs her "to hold in trust the amounts mentioned in one and two of this will for the benefit of my wife and daughter Lillian Drake." It seems to us that the testator intended that the plaintiff should apply to the Probate Court to be appointed trustee of the funds of \$2,000 and of \$1,000, both of which are a charge upon the estate given her by the ninth clause of the will. There will be no necessity of selling these parcels if she supplies the amount from her own funds.

We do not feel called upon to determine whether the words "said amount" in the gift over to the children of Mrs. Drake apply to the \$2,000, or only to such part of the sum of \$1,000 as may remain at the death of Mrs. Drake. *Perkins v. Stearns*, 163 Mass. 247, 250.

3. By the third clause of the will, the testator gives to his daughter Mary E. Sears a mortgage and note on a certain farm, called the Fletcher farm, for \$2,500; and by the fifth clause of the will he gave the use and income of the Fletcher farm above the mortgage given to his daughter, to his son, John E. Gilson, for life, with remainder to his children living at his decease. This mortgage and note were executed by the testator eight years before his death. The daughter was named in the mortgage as mortgagee, and the note was payable to her. The papers remained in the custody of the justice of the peace, who drew them during the life of the testator. Sometime before the testator died he caused to be written upon the note the words "No interest to be paid until after my decease." After the testator's death the plaintiff delivered the note and mortgage to Mrs. Sears, and she had the mortgage recorded, knowing the facts that we have stated.

There is no doubt that no action can be maintained upon the note and mortgage, because they are without consideration. *Parish v. Stone*, 14 Pick. 198. *Loring v. Sumner*, 23 Pick. 98. *Wilbar v. Smith*, 5 Allen, 194. And also because they were not delivered during the lifetime of the testator. *Fay v. Richardson*, 7 Pick. 91. *Hawkes v. Pike*, 105 Mass. 560. *Shurtleff v. Francis*, 118 Mass. 154. *Barnes v. Barnes*, 161 Mass. 381. *Meigs v. Dexter*, 172 Mass. 217.

The question, however, remains whether enough can be found in the will to show that the testator intended to give to Mrs.

Sears a pecuniary legacy of the amount named. If this bequest had been of the mortgage and note of a third person of the amount named, the legatee would not have been entitled to the amount but only to the note and mortgage, however small might have been their value. *Howe v. Bemis*, 2 Gray, 205. *Farnam v. Bascom*, 122 Mass. 282, 285. *Johnson v. Goss*, 128 Mass. 433, 435.

But where the testator bequeaths his own note, which is invalid for want of consideration or for want of delivery, such note may be considered as a pecuniary legacy. *Loring v. Sumner*, 23 Pick. 98. *Wilbar v. Smith*, 5 Allen, 194. And such we consider its effect in this case.

Although the mortgage is of no effect, we are of opinion that the amount of this legacy is a charge upon the Fletcher farm. The intention of the testator was clearly expressed that what Mrs. Sears took should be a charge upon this farm.

It follows from what we have said that John E. Gilson takes the Fletcher farm for life, with remainder to his children living at his decease, subject to the charge of the bequest to Mrs. Sears.

Decree accordingly.

On settling the decree in this case, it was contended by counsel that the court had not considered the following requests for instructions under clause one of the will: "What sum of money is to be paid to the plaintiff under clause one; shall the same be paid from the residuary fund, or however else shall the same be paid?" These questions were, by the presiding justice, brought to the attention of the justices who heard the case, and the following opinion was subsequently approved by them.

LATHROP, J. When this case was last before us the questions now presented were not argued and were considered as waived. We have now considered them, and are of opinion that it follows from the decision already made that the plaintiff is not entitled to anything under clause one, except to have her estate exonerated from the charge imposed upon it by clause nine of the will in favor of the testator's widow, when the sum of money found due the estate of the widow is paid.

Ordered accordingly.

BOSTON RUBBER SHOE COMPANY vs. ALBERT L. GORDON.

Suffolk. January 11, 1901. — April 8, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER,
HAMMOND, & LORING, JJ.

In an action by an indorsee of a promissory note against the maker, the defendant undertook to show that the note was without consideration as between the maker and the payee and that the plaintiff took it from the payee after maturity. The payee and indorser of the note who was a brother of the maker appeared as a witness for the defendant. In the course of his cross-examination the plaintiff's counsel produced a paper, showed it to the witness, and asked the question: "Will you swear that is not a copy of the entry from your own journal?" The witness answered "Well, I haven't my journal. I can't swear to copies of entries in my journal." The cross-examining counsel then put the question: "If your journal contains this entry: Bank of England, September 12, 1896, two hundred pound and six hundred and six pounds, ten shillings, eleven pence, paid A. Gordon, to go against which is the note of \$3,871.42, payable in any bank in Massachusetts, — don't you suppose there was a transaction behind it?" and the witness answered "I cannot swear anything about my journal." The paper was not put in evidence. *Held*, that the foregoing question was a natural and legitimate step in the cross-examination, and that it did not assume or imply that there was such an entry, and that it was competent for the jury to consider the answer of the witness on the question of his credibility.

In an action by an indorsee of a promissory note against the maker, the defendant undertook to show that the note was without consideration as between the maker and the payee and that the plaintiff took it from the payee after maturity. The payee and indorser of the note who was a brother of the maker appeared as a witness for the defendant. In the course of his cross-examination the plaintiff's counsel produced a paper and asked the witness "And on the same date you signed the paper of which that is a copy?" The answer was "I don't know. I can't say," and the paper was not offered in evidence. The plaintiff's counsel was then permitted, against the defendant's objection, to ask the following question: "Did n't you go to the Bank of England with Mr. Kekewich or some representative of that firm and Mr. Leland, and there do what was said to be necessary in order to transfer to Mr. Leland all that you had in the Bank of England in the way of money and accounts and notes and papers?" The witness replied "I signed something in the Bank of England." Mr. Leland was the treasurer of the plaintiff, a corporation. *Held*, that the question related to the character of a certain transaction and not to the contents of a written instrument, and that if the answer meant that the witness did not sign anything conveying the note, then the question and answer did no harm, whereas if the answer was an implied admission that he did sign a paper necessary to convey the note, then the answer was admissible, not as tending to show the contents of a written instrument, but as tending to affect the credibility of the witness's previous statement, that the note was always under his control as long as it remained in the Bank of England.

CONTRACT by a purchaser and indorsee of a promissory note for \$8,871.42 against the maker. Writ dated January 27, 1897.

At the trial in the Superior Court, before *Blodgett*, J., the plaintiff introduced the note, and the signature and indorsement being admitted rested its case. The defendant himself testified and called his brother Alvin J. Gordon, the payee and indorser to the plaintiff of the note, for the purpose of proving the defences relied on, which were that the note was without consideration as between the maker and the payee, and that the plaintiff, if the holder of the note, took it after maturity and without the payment of value.

The exceptions related to two questions asked Alvin J. Gordon on his cross-examination, and are fully stated in the opinion of the court. The plaintiff's counsel contended among other things that upon the evidence the testimony of the witnesses for the defence was not true and that the defences were not sustained.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which, after the resignation of *Blodgett*, J., were allowed by *Braley*, J.

The case was argued at the bar in January, 1901, and afterwards was submitted on briefs to all the justices.

C. R. Darling, for the defendant.

M. Storey, for the plaintiff.

MORTON, J. This is an action upon a negotiable note against the maker. The defence is that the note was an accommodation note, and that the plaintiff was not a purchaser for value before maturity. The payee of the note, who was also the indorser, was a witness for the defendant, and the exceptions relate to certain questions which were allowed to be put to him on cross-examination. Not all of the evidence is reported.

The witness testified that he received the note from the maker and put it with other drafts, notes and checks in the Bank of England. Various questions were asked him on cross-examination for the purpose of showing that he had negotiated the note with the Bank of England, and had received credit for the proceeds, and in the course of the examination counsel for the plaintiff produced a paper, showed it to the witness and asked the question, "Will you swear that it is not a copy of the

entry from your own journal?" The witness answered, "Well, I have n't my journal. I can't swear to copies of entries in my journal." There was no objection to the question or the answer. Thereupon the counsel asked the following question, "If your journal contains this entry: Bank of England, September 12, 1896, two hundred pound and six hundred and six pounds, ten shillings, eleven pence, paid A. Gordon, to go against which is the note of \$3,871.42, payable in any bank in Massachusetts,—don't you suppose there was a transaction behind it?" The witness answered, "I cannot swear anything about my journal." The paper was not put in evidence. The question was duly excepted to.

The objection is that it was an attempt to manufacture testimony by assuming or implying a book entry of which there was no evidence. Plainly the presiding judge did not so regard it or he would not have allowed the question to be put. Whether there was in the books of the witness such an entry as was described, or had been such a transaction manifestly bore on the question whether the note was an accommodation note and were proper subjects of inquiry from the witness. It would have been competent to ask him whether there was such an entry on his books or had been such a transaction. Instead of doing that counsel showed him a paper and asked him without objection if that was not a copy of an entry from his books. The witness replied in substance that he could not tell. The paper was not offered or put in evidence. Then came the question objected to, and the substance of it was, that, if there was such an entry, was there not a transaction behind it. In view of the previous question and answer it was a natural and legitimate step in the examination. The question did not assume or imply that there was such an entry. As proof that there was such an entry, it amounted to nothing. But it was open to the witness to deny that there had been such a transaction and consequently that there was or could be such an entry. And it was competent for the jury to consider his answer on the question of his credibility. Moreover, judging from a portion of the cross-examination contained in the bill of exceptions, it is not unreasonable to suppose that the presiding judge may have thought, and justly so, that the witness was untruthful, or evasive and uncandid in his answers

to the questions that were put to him. He was the brother of the defendant and the payee and indorser of the note. The matters relating to the defence were such as to be peculiarly within the knowledge of the defendant and the witness. Under the circumstances it does not seem to us that the presiding judge exceeded the just limits of his discretion in allowing the question to be put.

Some of the considerations to which we have adverted apply to the remaining question which was excepted to. Counsel for the plaintiff produced a paper and asked the witness, "And on the same date you signed the paper of which that is a copy?" The answer was, "I don't know. I can't say." The paper was not offered in evidence, and there was no objection to the question. Then the question that was excepted to was put: "Did n't you go to the Bank of England with Mr. Kekewich or some representative of that firm and Mr. Leland, and there do what was said to be necessary in order to transfer to Mr. Leland all that you had in the Bank of England in the way of money and accounts and notes and papers?" The witness answered, "I signed something in the Bank of England." The objection is that the question called for the contents of a writing. But, in the first place, it seems to us that the question related to the character of a certain transaction and not to the contents of a written instrument. In the next place, if the answer of the witness was understood as meaning, as perhaps it might have been, that he did not sign anything conveying the note then the question and answer did no harm. Again, if the answer was taken as an implied admission that he did sign a paper which was said to be necessary to convey the note, then the answer was admissible, not as tending to show the contents of a written instrument, but as tending to affect the credibility of his previous statement that the note was always under his control so long as it remained in the Bank of England. It seems to us that the question and answer were plainly admissible.

Exceptions overruled.

ELLA F. R. JORDAN vs. ANNA M. RILEY.

Middlesex. March 6, 1901. — April 18, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Where a grantor transfers to his grantee possession of a strip of land which he has occupied without title, adjoining, enclosed with and used as a part of the lot described in the deed, the possession of the grantor should be added to that of his grantee in computing the twenty years in which a title to the strip may be acquired by limitation. Following *Wishart v. McKnight*, ante, 356.

One is not less a disseisor or prevented from acquiring a title by lapse of time because his occupation of a strip of land is under the belief that it is embraced in his deed.

WRIT OF ENTRY demanding possession of a parcel of land on the northerly side of Wentworth Street in Malden, filed March 1, 1900.

In the Superior Court, the case was heard by *Bond, J.*, upon the following agreed facts: The demandant and the tenant were the owners in fee of adjoining estates. The land demanded was a strip of land about one hundred and twelve feet long and from three to four feet wide and enclosed by the tenant's fence with the land claimed and occupied by her.

The demandant claimed title to the demanded premises under two deeds: the southerly portion of the demanded premises by the deed of Sarah F. and Silas T. Fletcher dated March 31, 1893, and the northerly portion by the deed of Caroline A. R. Evans dated September 1, 1896. It was agreed that the descriptions of the land conveyed by these deeds included and covered the demanded premises.

It was further agreed that the earlier deeds of the demandant's grantors included by description the demanded premises, and that the demandant was entitled to the possession of the demanded premises and to judgment in this action, unless the tenant had acquired a valid title by adverse possession.

On August 31, 1880, Nathan French conveyed to the tenant the main part of the premises occupied by her described in a deed of that date, but it was agreed that the land described in that deed did not include the demanded premises. The tenant,

however, entered upon the demanded premises on the delivery of her deed from French on September 1, 1880, and from that date to the date of the writ had been in possession of the demanded premises, claiming title thereto, and claiming that the fence previously referred to was the easterly boundary line of her premises. It was agreed that the fence had been in its present location not less than twenty-one years before this action was brought.

The demandant was ignorant that the land which her deeds purported to convey to her included the demanded premises until shortly before this action was brought, when she caused her premises to be surveyed for the purpose of selling a portion. On ascertaining that her deeds included the demanded premises she demanded possession of the tenant, who refused to deliver possession or to suffer the demandant to enter, whereupon this action was brought.

It was agreed that the tenant's grantors, meaning the persons conveying the premises described in her deed, were in occupation and possession of the demanded premises continuously and claiming right and title to them, and claiming that the fence previously referred to was the easterly boundary line of the premises, for a period not less than two years before August 31, 1880, which added to the tenant's occupation as above would make a period of not less than twenty-one years of such occupation and claim by the tenant and her grantors together.

On these facts the judge gave judgment for the tenant with costs; and the demandant appealed.

C. R. Elder, for the demandant.

T. P. Riley, for the tenant.

HOLMES, C. J. The main point of this case is covered by *Wishart v. McKnight*, ante, 356. The demandant was disseised continuously for more than twenty years. Pub. Sts. c. 196, § 1. It is not material, if it be a fact, that the successive occupants of the tenant's lot claimed the disputed strip only because they were under a mistake as to where the boundary line would fall when the deeds were applied to the land. *Harrison v. Dolan*, 172 Mass. 395. *Bond v. O' Gara*, 177 Mass. 139.

Judgment for tenant affirmed.

FISKE WHARF AND WAREHOUSE COMPANY *vs.* CITY
OF BOSTON.

Suffolk. March 13, 1901. — April 13, 1901.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

The provision for a petition for damages in § 5 of St. 1875, c. 185, creating the board of park commissioners of Boston, applies only to cases where property is taken under the right of eminent domain and is no defence to an action of tort against the city of Boston for injury to a dock caused by water-logged portions of an old wharf removed by the board of park commissioners being allowed to drift into and sink in the plaintiff's dock.

TORT, with a count in contract, to recover for injury to the plaintiff's dock in ward six in Boston alleged to have been caused by the negligence of the defendant's agents and servants while constructing a recreation pier in that ward under St. 1893, c. 282. Writ dated June 15, 1899.

At the hearing in the Superior Court upon agreed facts, judgment was ordered for the plaintiff, and the defendant appealed. From the agreed facts the following appeared :

The plaintiff was and is the owner of Fiske's Wharf between Commercial Street in Boston and the harbor commissioners' line and of a dock lying on each side of that wharf.

In December, 1894, the board of park commissioners of Boston, under St. 1893, c. 282, took for the purposes of a public park the wharf, dock and other property situated next on the north and west and adjoining the property of the plaintiff. During the years 1896 and 1897 the park commissioners removed the wharf structure on the property so taken, formerly known as *Comey's Wharf*, and in its place built a wharf or structure now known as the *North End Recreation Pier*, extending the line of this wharf or pier about thirty feet south of the line of the original wharf, and abutting for its full length of about five hundred and seventy feet upon the line of the plaintiff's dock.

During the progress of the removal of *Comey's Wharf* and the building of the present pier, the plaintiff protested to the park commissioners against the dumping of materials from the

old wharf and pile butts or ends and braces from the new pier into the plaintiff's dock, where by the force of the current running in a southerly direction and by the slope of the dock they would be carried to the side of the dock next to the plaintiff's wharf.

Between July, 1897, and January, 1899, the plaintiff made claim to the park commissioners that its dock on the northwesterly side of its wharf was obstructed through the presence of pile butts and braces from the wharf constructed in 1896, and timbers, piles and other material from Comey's Wharf, and that it was, therefore, unserviceable to the plaintiff in carrying on its business of wharfinger and warehouseman on account of the injury which vessels might sustain through the presence of the butts, timbers and other material in its dock, and that the obstructions accumulated there through the negligence of the park commissioners.

On January 9, 1899, the plaintiff received the following letter from Charles E. Stratton, Esquire, chairman of the board of park commissioners:

"In regard to your claim that pile stubs are in your dock which were placed there by this Department, I am instructed by our Board to say that the evidence presented to us does not satisfy us that there are any pile stubs in your dock chargeable to this Department. Dredging the dock, I presume, is the only way to settle this question, and if this discloses pile stubs which came from our premises, we will pay you proper compensation for the cost of their removal."

To which the following reply, dated January 23, 1899, was sent:

"Yours of the 9th inst. duly received, and in accordance therewith we have arranged with the Eastern Dredging Company to clean out the dock in question. Were it not that we fear — and with reason, as we believe — the presence in the dock of pile butts and other material which came from your premises, it would not be necessary for us to dredge it, but of course, if it shall prove that our fears were groundless, we cannot expect to hold you responsible for them. The Dredging Company have agreed to begin work the last of this week, if possible, but not later than Monday next."

The dredging company completed their work of dredging obstructions from the dock on February 10, leaving the dock the same depth as before the acts done by the defendant, an inspector employed by the park commissioners being present while the work was going on, and on February 20 presented a bill of \$1,512 for dredging and towing material to sea dump. This bill was paid by the plaintiff and forwarded to the park commissioners.

On March 16, the following was received by the plaintiff :

“ City of Boston, Board of Commissioners of the Department of Parks, Jamaica Plain, Mass., March 16, 1899. Mr. John L. Nichols, Pres. Fiske Wharf & Warehouse Co., 15 Doane Street, Boston. Dear Sir, I enclose the report of our Superintendent to us on the subject of the bill paid by you for dredging your dock and the annexed report of our Engineer. We shall be glad to act in accordance with his recommendation. Very truly yours, Charles E. Stratton, Chairman.” Enclosed was the following :

“ City of Boston, Board of Commissioners of the Department of Parks, Jamaica Plain, Mass., March 15, 1899. Charles E. Stratton, Esq., Chairman. Dear Sir, Regarding the letter of the Fiske Wharf Company of February 20, and referred to me for report, I would say that one of our engineering force was detailed to keep tally at the dredge, while the work of dredging was going on. He was instructed to pay close attention to the matter, and his report, which is hereto attached, is very exact in detail, — to quote his words: ‘ The old and rotten piles and the oak timber could not have come from the Park pier, as it was built in 1896, and no oak timber was used in its construction. The other seven pieces may have come from the Park pier or from the Fiske Wharf, as oak piles were used in the construction of both ; but they were all found on the wharf side of the dock.’ On this showing, I do not see sufficient grounds for recommending the payment, by this Department, of any part of the bill of the Eastern Dredging Company. With regard to an examination for, or removal of, any pile butts that may be found alongside or under the Park Department’s dock, I would recommend that an appropriation of fifty dollars be made by this department to be expended for this purpose, under the direction of the Fiske Wharf Company. Respectfully submitted, J. A. Pettigrew, Superintendent.”

[The report of the engineer referred to above was also enclosed.]

In accordance with the suggestions contained in the letter of March 16, signed "Charles E. Stratton, Chairman," and the correspondence submitted therewith, and after notice to the park commissioners, the plaintiff employed a diver to remove from its dock the obstructions still remaining, notifying the defendant at the time the work was done, and an inspector employed by the park commissioners was present while the work was going on. Some twenty pieces of material, consisting of pile butts and other substances which would render dangerous the use of the dock by vessels, were removed by the diver, for whose services \$87.50 were paid by the plaintiff.

For the purposes of this action it was agreed that the plan as laid out by the park commissioners for the construction of the pier was proper. It was also agreed that the pile butts found in the dock were the tops of piles used in the construction of the pier, and that the pieces of oak piles and timber enumerated in the letter of the engineer were part of the old Comey's Wharf removed by the commissioners. It was also agreed, that the removal of these obstructions was necessary to the use of its dock by the plaintiff, that the removal was made in a proper manner and that the work of dredging and that performed by the diver would not have been necessary had it not been for the presence of pile butts and other obstructions through the acts of the park commissioners.

All of the work of constructing the pier was done by one McInnis under a written contract made by and between McInnis and the city of Boston by its board of park commissioners, in accordance with the provisions of St. 1890, c. 418. No notice of this contract was given to the plaintiff until after the bringing of this action.

It was agreed that if, from the facts stated, the court should be of opinion that the defendant was liable to the plaintiff in this action, judgment should be entered for the plaintiff in the sum of \$1,599.50 and interest from February 20, 1899; otherwise, judgment should be for the defendant.

S. M. Child, for the defendant.

H. F. Strout, for the plaintiff.

LORING, J. We understand that it is agreed by the parties that the old wharf was removed by the board of park commissioners of the defendant city, and that the construction of the new pier only was done by an independent contractor. It is further "agreed that if, from the facts herein stated, the court should be of the opinion that the defendant is liable to the plaintiff in this action, judgment shall be entered for the plaintiff in the sum of fifteen hundred and ninety-nine dollars and fifty cents (\$1,599.50) and interest from February 20, 1899."

It is plain that on the facts agreed the defendant city could be found to be liable for injury to the plaintiff's dock, caused by water-logged timber and piles, part of the old wharf, being allowed to drift into, and to the bottom of, the plaintiff's dock. The only defence set up by the city to this claim is that the plaintiff's remedy for that injury is not an action of tort but a petition for damages under St. 1875, c. 185, § 5. There is nothing in that; that section applies only to cases where damages are caused as part of the taking of land under the power of eminent domain, as in *Holleran v. Boston*, 176 Mass. 75.

As it is agreed that judgment shall be entered for the plaintiff in the sum of \$1,599.50, if any liability is disclosed on the part of the defendant, it is immaterial that some of the piles and timber in the bottom of the plaintiff's dock came from the construction of the new pier by an independent contractor for whose acts the defendant was not liable.

Judgment affirmed.

ATLAS NATIONAL BANK vs. NATIONAL EXCHANGE BANK.

Suffolk. March 14, 1901. — April 15, 1901.

Present: **HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.**

A custom of banks sending notes through a clearing-house fixing a time within business hours when the conditional payment of a note by its having gone through the clearing-house becomes absolute if the note is not returned if established by proof, is valid.

In an action by a bank to recover back money paid by it to another bank through the Boston clearing-house on a note of a corporation which failed the same day, the defendant sought to prove a custom of banks sending notes through the clearing-house fixing a time within business hours when the conditional payment of a note by its having gone through the clearing-house becomes absolute if the note is not returned. The judge below in reporting the case stated his action as follows: "I find also that such a rule has not been established by a universal, uniform and general custom, and rule that a custom, if one exists, to return such notes before the end of the business hours of the receiving bank would be bad." *Held*, that this was not a finding of fact that no such custom existed, but a ruling of law that such a custom if it existed would be bad.

Where the conclusion of a report of a case from the Superior Court declared that "If the said rulings of law and refusals to rule, or any of them are wrong, judgment is to be entered for the defendant," and the judge in reporting the case stated that he signed the report in this form "understanding that no other course was open" to him under a decision of this court given at a previous stage of the case, whereas this court had not intended to give any directions upon the point, this court did not give judgment for the defendant, although one of the rulings referred to was wrong, but ordered the report discharged and a new trial granted.

CONTRACT for money had and received, to recover the amount paid by the plaintiff through the Boston clearing-house on a note of the Boston Woven Hose and Rubber Company indorsed by the Lawrence National Bank and by the defendant. Writ dated August 24, 1898.

The case was heard in the Superior Court by *Hopkins, J.*, who found for the plaintiff and reserved the case for the consideration of this court. This court in a decision reported in 176 Mass. 300, ordered that the report should be discharged, that the defendant might have an opportunity to present to the Superior Court a motion for an amendment of the report or for such other action in the premises as it might be advised to pursue.

The report originally concluded as follows: "The case is now reported to the Supreme Judicial Court. If, as matter of law on the foregoing facts, the plaintiff is not entitled to recover, judgment is to be entered for the defendant; otherwise judgment is to be entered upon the above finding for the plaintiff."

After the report was discharged by order of this court, the defendant presented in the Superior Court to *Hopkins, J.*, a motion to amend the original report by striking out in the conclusion thereof the words, "if as matter of law on the foregoing facts, the plaintiff is not entitled to recover," and substituting therefor the words, "if the said rulings of law and refusals to rule, or any of them are wrong," so that said report should conclude as follows: "If the said rulings of law and refusals to rule, or any of them are wrong, judgment is to be entered for the defendant, otherwise judgment is to be entered upon the above finding for the plaintiff."

The plaintiff at the same hearing presented a motion to amend the original report by making certain additions to the testimony reported.

The judge reported his action on these motions as follows: "I denied the plaintiff's motion and allowed the defendant's motion to amend, understanding that no other course was open to me under the last paragraph of the opinion of the Supreme Judicial Court in this case." The case came again before this court on the amended report.

On the day that the plaintiff bank paid the note, through the settlement of its daily balance at the clearing-house, it found out that the Boston Woven Hose and Rubber Company had made an assignment, and sent back the note to the defendant bank, but this was at or about three o'clock P. M., after banking hours, although the defendant bank happened to be open. The clerk there refused to receive it. At ten minutes before one o'clock, time had been asked for by the Hose Company and granted by the plaintiff. There was evidence, that there was a rule or custom that notes must be returned before two o'clock or, if time was given, at two o'clock. These and other facts appearing by the report are stated at length in the opinion reported in 176 Mass. 300, and conclusions of fact warranted by the evidence are stated in the present opinion.

J. P. Sweeney, for the defendant.

A. Hemenway, (*C. B. Barnes, Jr.* with him,) for the plaintiff.

LOBING, J. In the former opinion in this case, 176 Mass. 300, we stated at length the grounds on which we were of opinion that there had been a mistrial, and it is not necessary now to restate them in detail.

There was evidence (1) that sending the note through the clearing-house was a presentment of it for payment, and (2) that, although there was not a universal custom to send notes through the clearing-house, there was a universal custom among those banks which did so, by which the time was fixed when the conditional payment became absolute, in case the note sent through the clearing-house had not been returned; on this point, there seems to have been no conflict in the testimony. As to what that time was, there was some conflict; but with the single exception of the testimony of the cashier of the plaintiff bank, who was responsible for the note in question not having been returned earlier in the day, it appeared that the note was not returned within the time fixed by the custom. And further, there was evidence that, (3) even if the custom was not universal, the conditional payment of this note had become absolute; the evidence warranting that finding is the testimony of the cashier of the plaintiff bank that when the treasurer of the Hose Company told him at or about three o'clock that it had made an assignment, he said to him that his bank had paid the note and that he had paid it to accommodate the Hose Company. This testimony, coupled with the evidence of the custom (even if it was found not to be a universal one), and the evidence that notes were habitually sent through the clearing-house by the two banks in question, justified such a finding; the obvious, if not the only, meaning of it is that, by not returning the note, he, the cashier of the plaintiff bank, had designedly omitted to return the note, with the intention of allowing the conditional payment to become an absolute one, to accommodate the Hose Company, which was one of its depositors, and had thereby paid it for the company, though not in funds at the time. Had it not been for the testimony of the same witness that, where time is given on a note, which has gone through the clearing-house, there is no exact hour at which the note must be

returned, unless it is necessary to return it before the safe of the bank in question is locked for the day, and that the note in question was seasonably returned, it is hard to see why the defendant would not have been entitled to a finding in this connection as matter of law. These issues of fact were not passed upon by the presiding judge as they should have been; and the presiding judge was wrong in ruling that a custom would be invalid, which fixed a time within business hours when the conditional payment of a note, made by the note having gone through a clearing-house, becomes absolute. For these reasons there was a mistrial.

The plaintiff contends that the error of the judge in making this ruling does not entitle the defendant to a new trial because the judge found as a fact that no such custom existed. We do not think that the report should be so construed; the finding was: "I find also that such a rule has not been established by a universal, uniform and general custom, and rule that a custom, if one exists, to return such notes before the end of the business hours of the receiving bank would be bad." This is followed by an elaborate argument in support of this ruling, which covers three and one half pages of the printed record. Taking the two parts of the sentence together, the report should not be construed, as the plaintiff contends, to be a finding of fact.

It is stated in the present report that the clause setting forth the terms, on which the case is to be disposed of, was inserted by the judge because he thought no other course was open to him under the former opinion. In the former opinion we did not intend to give any directions on that point and for that reason we think that this report should be discharged.

Report discharged; new trial granted.

WILLIAM S. WHITING vs. HERMAN F. BURKHARDT & others.

Suffolk. March 18, 1901. — April 15, 1901.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

The Massachusetts standard form of fire insurance policy provides, that the policy shall be void if assigned without the assent of the company in writing or print. Such a policy was taken out by a mortgagor and made payable to the mortgagee "as his interest may appear." The mortgagee assigned the mortgage and also without the assent or knowledge of the insurance company assigned to the assignee of the mortgage all his "right and interest" in the policy. *Held*, that this was not a transfer of the policy within the above prohibition, but merely an assignment of the right to receive the proceeds as security for the mortgage debt. One to whom an insurance policy is payable as "mortgagee, as his interest may appear," may assign to the assignee of the mortgage the right to receive on the same terms the proceeds of the policy.

The Massachusetts standard form of fire insurance policy, prescribed by St. 1894, c. 522, § 60, contains the following provision: "If this policy shall be made payable to a mortgagee of the insured real estate, no act or default of any person other than such mortgagee or his agents, or those claiming under him, shall affect such mortgagee's right to recover in case of loss on such real estate." It also provides, that the policy shall be void if the property is sold without the assent of the company in writing or print. A standard policy on mortgaged real estate was made payable to the mortgagee in case of loss. Without the assent or knowledge of the company, one of the two mortgagors who took out the policy conveyed his interest in the mortgaged property and his interest was also sold on execution. *Held*, that this conveyance and sale did not affect the right of the mortgagee to recover on the policy.

The objection to a bill in equity that the plaintiff has a plain, adequate and complete remedy at law not set up in the defendant's answer cannot be taken for the first time in this court.

BILL IN EQUITY by William S. Whiting against Herman F. Burkhardt, Albert L. Jewell and the North British and Mercantile Insurance Company, to recover as mortgagee for a loss by fire to property covered by the mortgage and situated in Hull, Massachusetts, the property at the time of the loss being covered by a policy of insurance issued by the defendant insurance company, and the proceeds of the policy being claimed by each of the other two defendants, if the plaintiff was not entitled thereto, filed September 14, 1899.

The case was heard in the Superior Court by *Bell, J.*, who at the request of the parties reported it upon the facts as found by him for the consideration of this court, such order to be made therein as might seem meet and proper.

The facts found by the judge were as follows: The policy was issued on June 20, 1898, to Herman F. Burkhardt and George W. Guptill, and was issued "payable in case of loss to Albert L. Jewell, mortgagee, as his interest may appear." The plaintiff as trustee became the owner of the mortgage on October 13, 1898, Jewell having on that day assigned the mortgage to Whiting, trustee, and having delivered the policy to Whiting, trustee, after indorsing thereon the following: "October 13, 1898. For value received I hereby assign and set over all my right and interest in this policy, and all the advantages to be derived therefrom, unto William S. Whiting, trustee for John S. Whiting, Son & Co., assignee of my mortgage. Albert L. Jewell."

Jewell at the time of the transfer of the mortgage indorsed in blank the mortgage note, waiving demand and notice. The mortgage contained a covenant to keep the property insured for the benefit of the mortgagees.

On June 11, 1899, the property was entirely destroyed by fire, and it was proved that the damage at least equalled the insurance upon the buildings, and that the amount due upon the mortgage was in excess of the total amount of insurance.

On April 15, 1897, Jewell had conveyed by deed the insured building, together with the land on which it stood, to George W. Guptill and the defendant Burkhardt. The latter being a trustee of the Burkhardt Brewing Company, a trust association, the other trustees being Gottlieb F. Burkhardt and P. W. Burkhardt. By this deed Guptill and the defendant Burkhardt became record joint holders of the property, but the defendant Burkhardt held the title for the Burkhardt Brewing Company with the verbal understanding that Guptill could purchase that half at any time by paying what the company had paid for it, with any interest, taxes, or other expenses on its account, and also paying any sum that Guptill might owe the company for merchandise. Upon receipt of the deed Guptill and Burkhardt executed a note and mortgage for \$10,875 to Jewell, which was the mortgage later assigned by Jewell to the plaintiff as above set forth.

The policy insured Herman F. Burkhardt and George W. Guptill and their legal representatives against loss or damage

by fire to the amount of \$1,500 on frame buildings and additions situated on the easterly side of Main Avenue, Nantasket, in the town of Hull, Massachusetts, known as Hotel Hollis, for the term of one year from the twenty-fourth day of June, 1898, and was in the Massachusetts standard form prescribed by St. 1894, c. 522, § 60. It contained the usual provision that it should be void if without the assent of the company in writing or print "the said property shall be sold or this policy assigned." It contained also the provision that "If this policy shall be made payable to a mortgagee of the insured real estate, no act or default of any person other than such mortgagee or his agents, or those claiming under him, shall affect such mortgagee's right to recover in case of loss on such real estate."

On or about November 1, 1898, the defendant Burkhardt, Gottlieb F. Burkhardt and P. W. Burkhardt, as the Burkhardt Brewing Company, brought suit against Guptill, and made an attachment of his interest in the property insured. On December 30, 1898, Guptill conveyed his interest in the premises to one Harvey H. Pratt. On or about February 11, 1899, the interest of Guptill was sold on execution, issued in the above mentioned suit, to Gottlieb F. Burkhardt, one of the attaching creditors.

The assent of the defendant company was not obtained to the transfer of the insurance made by the defendant Jewell to Whiting, trustee, and it had no knowledge thereof nor of the assignment of the mortgage until after the date of the fire. The defendant company had no knowledge of the attachment by the Burkhardt Brewing Company and the sale of the property on execution in that suit to Gottlieb F. Burkhardt, nor of the transfer by Guptill to Harvey H. Pratt, nor did the defendant Burkhardt know of the conveyance by Guptill to Pratt. No conveyance had been made before the fire by the defendant Burkhardt of his interest in the property.

The judge found that the insurance company waived a reference to arbitrators under the terms of the policy, and also waived any other or further proofs of loss than those actually filed, and that if the insurance company was liable at all it was liable for the full amount of its policy, together with interest since July 8, 1899, on or before which date the amount due under the policy became payable.

W. C. Cogswell, for the plaintiff.

A. M. Lyon, for the insurance company.

F. C. Gilpatric, for Burkhardt, submitted the case on a brief.

J. H. Appleton, for Jewell, also submitted the case on a brief.

LORING, J. The assignment by Jewell of all his right and interest in the policy was not a violation of the provision that the "policy shall be void . . . if . . . without the assent in writing or in print of the company . . . this policy [shall be] assigned." The object of that provision, (coupled with the provision declaring the policy void if the property insured is sold,) is to prevent the company becoming the insurer of the property of a person who is not acceptable to it; an insurance company has the right to refuse to insure a person whose character is such that the moral risk (to use a term employed in the insurance business) is greater than it is where the same property is owned by an honest man, and is a risk, which they do not care to assume. The transfer prohibited by this provision is a transfer of the contract of insurance; that is to say, a transfer by Guptill and Burkhardt, the persons insured; not a transfer by Jewell, who was the person designated as the person entitled to receive the proceeds of the insurance, if any, due under the contract between the company on the one hand and Guptill and Burkhardt on the other. The distinction is plainly and fully pointed out in *Fogg v. Middlesex Ins. Co.* 10 Cush. 337, 346; *Phillips v. Merrimack Ins. Co.* 10 Cush. 350, 353; *New York Mutual Ins. Co. v. Allen*, 138 Mass. 24, 28, 29; *Merrill v. Colonial Mutual Ins. Co.* 169 Mass. 10, 13, 14. What Jewell did by assigning his "right and interest in this policy" was not to transfer the policy, but to assign to another his right to receive the proceeds, if any, under it; the policy remained after the assignment, as it was before, the policy of Guptill and Burkhardt.

We see no reason why Jewell should not make the assignment made by him; the policy was made payable to him as "mortgagee, as his interest may appear"; he assigned his right to receive the proceeds, if any, to the assignee of the mortgage in question, and the plaintiff's right to receive the proceeds of the insurance was subject to this clause in the hands of the plaintiff and could not be held by him for any debt other than the debt secured by that mortgage.

The conveyance by Guptill of his interest in the building insured did not affect the right of the plaintiff to recover in case of loss; it is provided in the policy, that "If this policy shall be made payable to a mortgagee of the insured real estate, no act or default of any person other than such mortgagee or his agents, or those claiming under him, shall affect such mortgagee's right to recover in case of loss on such real estate." This mortgage was originally made payable to "Jewell, mortgagee," and after the assignment by Jewell of his interest to the plaintiff, who had in fact become the assignee of the mortgage in question, it continued to be "payable to a mortgagee," and, as we have said, it could not have been held by the plaintiff for any debt other than the mortgage debt in question.

The objection that there is a plain, adequate and complete remedy at law was not set up in the answers or any of them, and being raised for the first time in this court, is not taken in time. *Jones v. Keen*, 115 Mass. 170. *Crocker v. Dillon*, 133 Mass. 91. *Parker v. Nickerson*, 137 Mass. 487.

A decree must be entered directing the defendant insurance company to pay to the plaintiff the amount of the policy with interest from September 4, 1899.

So ordered.

J. WESTON ALLEN, trustee, *vs.* GEORGE E. FRENCH
& others.

Middlesex. December 10, 1900. — April 18, 1901.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

On an appeal from a decree of the Superior Court in equity, it appeared that the evidence was taken by a commissioner appointed at the request of both parties under Equity Rule 35 of that court. The judge at the request of the appellant under St. 1883, c. 223, § 7, reported the facts found by him. *Held*, that this court must consider not only the findings of the judge but also the evidence reported under Rule 35, upon which his decree was made, although the court would not reverse the decree unless clearly wrong and would accept as true the findings of fact reported unless clearly wrong.

The transfers of property by a debtor described in the opinion in this case were *held* to constitute both in effect and in purpose a preference under the United States bankruptcy act of 1898, and the transactions including those transfers were *held*

to be in fraud of the bankruptcy act in that they prevented and were intended to prevent a large portion of the debtor's property from being administered in bankruptcy, and also to be fraudulent at common law in that they were intended to place certain property of the debtor beyond the reach of his creditors.

BILL IN EQUITY by a trustee in bankruptcy of the estate of James H. Wentworth of Newton against George E. French of Newton, Charles W. Boynton of Bedford and others, praying that a transfer made by Wentworth to French and Boynton on July 14, 1898, of one hundred and ninety-eight shares of the capital stock of the J. H. Wentworth Company be adjudged to be in fraud of the provisions of the United States bankruptcy act and a fraud upon the creditors of Wentworth and on the plaintiff as representing them and that the defendants be ordered to transfer the shares of stock to the plaintiff, filed May 17 and amended October 4, 1899.

The case was heard in the Superior Court by *Mason*, C. J., who ordered a decree dismissing the bill with costs. The plaintiff appealed. The evidence had been taken by a commissioner appointed under Equity Rule 85. The plaintiff requested a report of facts under St. 1883, c. 223, § 7. The judge began his report of facts as follows:

"In this case a commissioner to take evidence was appointed under Rule 85 at the request of both parties. The plaintiff, having appealed from the decree entered, now within the time required by the statute requests under section 7 of St. 1883, c. 223, a report of the facts found. Being in doubt whether the appellant has the right to combine the two methods of taking the case to the full court or at this stage to substitute a report of facts found for a report of the evidence, in order that no rights may be denied this report is made."

After stating other findings, the report concluded as follows: "The defendant French was at the time of the transfer on July 14, 1898, a secured creditor, and for everything which he received beyond the security which he already held he paid full value and the transfer was not a preference and was not in violation of the bankrupt law.

"The bill does not contain specific allegations with reference to the payment and conveyance to the wife of J. H. Wentworth and the evidence does not disclose fully the circumstances under

which the same were made. The court does not find that there was any fraud of creditors in such payment and conveyance."

The evidence upon which this court founded its decision is described in the opinion.

J. W. Allen, for the plaintiff.

J. C. Ivy, for the defendants.

BARKER, J. This bill was brought by the trustee of the bankrupt estate of James H. Wentworth to set aside certain transfers made on July 14, 1898, by the bankrupt, of one hundred and ninety-eight of the two hundred shares of the corporate stock of the J. H. Wentworth Company, to the defendant French. The ground first alleged was that the transfer was made to prefer French. By an amendment it was alleged that the transfer was in fraud of Wentworth's creditors.

The case was heard by the Chief Justice of the Superior Court, who entered a decree dismissing the bill with costs. The plaintiff then requested under St. 1883, c. 223, § 7, a report of the facts found and such a report was made. Thereafter the plaintiff appealed to this court. The evidence was taken by a commissioner appointed under the Equity Rule 35, and we have before us the pleadings, the evidence reported by the commissioner under the rule, the report of facts found, made under St. 1883, c. 223, § 7, the decree dismissing the bill, and the appeal.

The defendants contend that the plaintiff is not entitled to have this court consider the evidence reported by the commissioner, and that the only question open upon the appeal is whether upon the facts found and reported under St. 1883, c. 223, § 7, the decree should be affirmed. The provision made by the section cited is general and cannot be construed to exclude from its operation cases in which the right of having all the evidence reported under Rule 35 has been exercised. In all such cases it is the duty of this court to consider the evidence so brought up. At the same time, the ordinary rule of decision in cases heard and determined by a lower court or a single justice, and brought here by an appeal which requires us to consider the evidence upon which the decree was made, is to be applied. This rule prevents us from reversing the decree appealed from unless it is in our view clearly wrong. It also requires us to

accept as true the findings of fact reported, unless we find them to be clearly wrong.

Giving to the decree dismissing the bill, and to the findings of fact reported after the entry of the decree, the weight to which they are entitled under the rule of decision referred to, and considering the evidence reported by the commissioner under Rule 35, we find the facts concerning the transfers sought to be set aside as follows.

Wentworth's mercantile business was the purchase of lumber, the running of a planing and moulding mill and the sale of its product, chiefly in the form of interior finishings for building purposes. His statement of assets and liabilities on January 1, 1898, showed assets which he valued at \$68,655.77, and liabilities of \$45,321.06. Of the assets the cash and stock on hand in his mercantile business and the book accounts, land, machinery and buildings, and horses and teams belonging to that business made up \$59,514.77. The other \$9,141 was in outside land. The liabilities were, notes payable \$11,875.80, bills payable \$20,539.26, mortgage on mill \$9,906, and mortgage on the outside land \$3,000.

In the early part of the year 1898 he found difficulty in meeting his pecuniary obligations, and, about the last of March, he applied to his lawyer for advice. The lawyer at once asked who was his heaviest creditor, and upon receiving the reply that it was Mr. French of the Atlantic Lumber Company, told Wentworth to go and bring in French, who is the principal defendant. At this time Wentworth owed no debt to French personally, but French owned the stock of the Atlantic Lumber Company, a corporation, and managed and controlled its business, and was a creditor of the corporation to the amount of \$18,000. The Atlantic Lumber Company was a creditor of Wentworth to the amount of \$13,000 or more, and was his heaviest creditor. Besides this French was a personal friend of Wentworth, and desired to help him, because at a previous time Wentworth had aided French by indorsing his notes for the amount of \$15,000, at a time when French needed accommodation. French was at once informed that Wentworth did not have the money to meet his obligations, and from that time French took an active part in the arrangement of Wentworth's affairs, with two purposes

in view. The first was to save the Atlantic Lumber Company from any loss on account of Wentworth's indebtedness to it, and the second to help Wentworth save some part of his assets from being applied in discharge of his other debts, by turning it over to the wife of Wentworth. As the first step in pursuance of these purposes Wentworth conveyed and French received Wentworth's outside land in extinguishment of \$7,000 of the \$13,000 claim of the Atlantic Lumber Company. This left Wentworth with his mercantile business as his only resource. French next caused Wentworth to have created a corporation, the J. H. Wentworth Company, with a capital stock fixed at the sum of \$20,000, in payment of which the stock, book accounts, horses and teams belonging to Wentworth's business, and the equity of his mill and machinery were all transferred and conveyed to the corporation.

The charter of the corporation was issued on April 25, 1898. The incorporators were Wentworth, one Gilkey, his clerk and bookkeeper, and a Mr. Dickerman, a friend and neighbor of Wentworth's. Dickerman was then an indorser for Wentworth to the amount of \$5,000, and had a claim against him growing out of an old transaction in mining stocks, and also had a mortgage of \$1,200 on a house the title of which stood in Mrs. Wentworth. The two hundred shares of the capital stock of the corporation were issued on April 29, 1898, one share to Dickerman, one share to Gilkey, and one hundred and ninety-eight shares to Wentworth. Dickerman paid nothing for his share, and Gilkey's share was paid for by \$100 given to him by Wentworth for that purpose. Of the one hundred and ninety-eight shares issued to Wentworth one hundred were pledged by him to Dickerman as collateral security for a note for \$10,000 given by Wentworth to him, which note was also secured by a third mortgage of the mill and machinery. For this \$10,000 note, Dickerman gave to Wentworth \$7,800 in money, released his \$1,200 mortgage on Mrs. Wentworth's land, and gave up his claim growing out of the old mining stock transaction.

On May 3, 1898, Wentworth pledged twenty of his remaining ninety-eight shares to secure payment of a note of \$2,000 made by his wife on December 1, 1897, leaving him with seventy-eight shares unpledged. In paying in the capital stock he had

divested himself of all the assets of his business which could have been taken for his debts, which assets were his stock of lumber and supplies worth over \$16,000, book accounts worth \$5,000, and horses and teams worth \$1,000. There was no sale for the shares of stock which he received in lieu of his assets transferred to the corporation in the paying in of its capital. The seventy-eight unpledged shares and the \$7,800 delivered to him by Dickerman on the \$10,000 note were all the means he had in hand with which to pay his debts, save the equities in the pledged shares.

French then caused Wentworth to call a meeting of his creditors and to offer them a compromise, promising to lend him \$5,000 with which to pay them twenty-five cents on a dollar. The call was made early in May. At the meeting French became one of the committee. They recommended the creditors to accept thirty per cent of their claims, in full payment, and at an adjourned meeting held on May 13, 1898, the report was accepted and the recommendation adopted. An agreement bearing that date was executed by thirteen of Wentworth's creditors assigning their debts due from him to his lawyer, to the extent and amount set opposite their signatures, the assignment to be void if the thirty per cent should not be paid. This agreement was signed by the Atlantic Lumber Company by French as treasurer, in the sum of \$4,216, which was at least \$2,000 less than the amount of Wentworth's debt to the company. Only a part of the creditors assented to the proposed compromise.

On May 28, 1898, one of the creditors who had not agreed to accept the compromise, and whose debt amounted to several hundred dollars, attached, in a suit to collect his debt, Wentworth's interest in the one hundred and ninety-eight shares of stock. On May 31, 1898, French and Wentworth agreed in writing that the assignment of claims by his creditors dated May 13, to Wentworth's lawyer, and the latter's authority over those claims, should be subject to the exclusive control and direction of French, and this writing was assented to in writing by the lawyer.

On June 7, 1898, Wentworth, expecting to get from French \$5,000 with which to make his compromise, gave to French nine notes for \$1,250 each, dated May 23, 1898, each of which notes

pledged the seventy-eight shares of Wentworth's stock, remaining until then unpledged, as collateral security for the payment of the note. These notes aggregated in amount \$11,250. This sum was arrived at by adding to \$6,250, the amount of the Atlantic Lumber Company's claim, the \$5,000 which French had agreed to lend Wentworth to make his compromise. Upon obtaining the nine notes French gave to Wentworth French's individual cheque dated May 28, 1898, for \$2,400.15, which was the sum required to pay the assenting creditors, other than the Atlantic Lumber Company, thirty per cent of their claims stated in the compromise agreement of May 13, 1898. At the same time French refused then to give Wentworth any more of the promised \$5,000, and he never gave to Wentworth any part of it but the \$2,400.15. From June 7, 1898, French was a personal creditor of Wentworth to that amount. As French never bound himself to pay any part of the Atlantic Lumber Company's claim, and never advanced more than the \$2,400.15 that sum was in truth the whole amount for which he could hold the seventy-eight shares under the pledges contained in the nine notes, which had no other consideration.

The mortgages given to Dickerman as security for the \$10,000 note of April 8, 1898, which pledged to him the one hundred shares, were of value, covering real estate and machinery of the assessed value of \$13,500, and being subject to prior mortgages of only \$9,900. The value of these mortgages must be taken into account, and there can be no doubt that Wentworth's equity in this one hundred shares of stock was worth several thousand dollars, unless, owing to the language of the note which contained the pledge, Dickerman could hold the stock to indemnify him as indorser for Wentworth.

The \$2,000 note of December 1, 1897, made by Mrs. Wentworth, for which the twenty shares of stock were transferred as collateral on May 3, 1898, was held by one Newhall. This note did not represent a debt, but grew out of a land and building transaction between Mrs. Wentworth and Newhall, and the real purpose of the note, if it was not a mere cover, was to make it certain that Newhall would get his half of the profits of the real estate transaction, which profits were only \$500, and the pledge of the twenty shares was in effect for no more than that sum.

Moreover Mrs. Wentworth was pecuniarily responsible and, in estimating the value of Wentworth's equity in the twenty shares, it is to be taken into account that the pledge of those shares was for no debt which he was bound to pay; and that if the apparent debt should be discharged by sale of the stock Wentworth would have the right to an indemnity, which right would pass to his vendee upon his transfer of his equity in the twenty shares.

The Atlantic Lumber Company had a customer in New Hampshire named Boynton, who operated a planing and lumber-working mill. On July 8, 1898, Wentworth's equities in the one hundred and ninety-eight shares of stock being in the situation already stated, Wentworth executed and delivered to French a sealed instrument by which Wentworth agreed to give to Boynton, or to any one acting on his behalf, the exclusive right to purchase any and all of Wentworth's equities in the shares for the sum of \$1,000, to be paid one half in cash and the balance in a note to be made by French payable to Mrs. Wentworth, the offer to be accepted in writing on or before noon of July 11, 1898, and a reasonable time after that noon to be allowed in which to transfer the shares, which Wentworth covenanted were one hundred and ninety-eight in number, and to pay the cash and deliver the note.

On July 11, 1898, the limit of time in the offer was extended to noon of July 14, 1898. On that day, at the mill, all of Wentworth's interests in the one hundred and ninety-eight shares of stock were transferred absolutely to French, who by these transfers became the owner of the one hundred shares pledged to Dickerman subject to that pledge, and the absolute owner of the other ninety-eight shares. Of these French caused one share to be transferred to Boynton, who had no interest in the transaction, and served simply as a tool for the Atlantic Lumber Company, and one share each to two employees of that company. Dickerman, who holding one share of stock in his own name had been a director and president of the Wentworth Company since its organization, with a salary of \$20 a week, resigned his offices, as also did Wentworth, who had been a director and treasurer up to that time, and new officers were installed in their places, thus giving the Atlantic Lumber Company absolute control of

the Wentworth corporation and of its assets and business and good will. In consideration of these transfers to him French gave up to Wentworth the nine notes of \$1,250 each, dated May 23, 1898, and the notes and claims of the Atlantic Lumber Company against Wentworth. As part of the transaction, and at the same time, French gave to Mrs. Wentworth the Atlantic Lumber Company's cheque for \$3,000, which she deposited in bank to her own credit. French also at the same time conveyed to Mrs. Wentworth an equity worth \$2,000 in a house and lot, and covenanted with Wentworth to pay toward the liquidation of his then debts thirty per cent thereof, and also to pay to Wentworth for repairs not exceeding \$175 in amount, which the latter was to make on the house conveyed by French to his wife, with a stipulation that the total sum to be paid by French should not exceed \$2,000. In fact French never did contribute any more money toward the liquidation of Wentworth's debts.

The demands of the Atlantic Lumber Company amounting to \$6,250 had not been paid or extinguished up to the time of these transfers of July 14, 1898. As a part of the transactions of which those transfers were a part these claims were extinguished. French the sole owner and the manager of the Atlantic Lumber Company in part consideration of the extinguishment of those claims received the transfer of the debtor's interest in the stock, and he and Wentworth did such other acts as then and there practically vested the control of the Wentworth Company and of its assets and business in the Atlantic Lumber Company.

This was a wholly voluntary proceeding on the part of French, and it is a necessary inference that in concluding the transactions of July 14, French was acting for the Atlantic Lumber Company, and that that company received what it deemed to be and what upon the evidence was an equivalent for its claims which were then cancelled. This is supported by the facts that Wentworth's equities in each of the three blocks of stock were of value, that in the twenty shares of \$1,500 at least, and that in the seventy-eight shares of \$5,400, and in the one hundred shares of probably several thousand dollars more, while the transfers, the resignations and the new elections gave, in addition to the intrinsic value of the equities, the good will and the control of the business.

The working of the scheme up to July 14, 1898, had cost French and the Atlantic Lumber Company the \$2,400.15, advanced on June 7, but the company had received full payment of \$7,000 of its \$13,000 claim. By the transfers of July 14, 1898, the Atlantic Company got complete control of the manufacturing stock, book accounts and horses and teams which, when French began his campaign were Wentworth's unencumbered assets, and which at all times were worth over \$20,000. The Atlantic Company and French having paid in addition to the \$2,400.15, the \$8,000 turned over to Mrs. Wentworth on July 14, and \$2,000 more in the land then conveyed to her, the whole cost to French and his corporation was \$7,400.15. Add to this the Atlantic Lumber Company's claim of \$6,250, making \$13,650.15, and French by means of the transfers of July 14 not only in effect obtained for the Atlantic Company payment in full of its debt of \$6,250, but a handsome surplus in addition, which it could realize at leisure, with the stock of the Wentworth Company in the hands of French, Boynton, and the two employees of the Atlantic Company.

This was in effect, as well as in purpose and intention, a preference of the Atlantic Lumber Company to the whole amount of its debt, and so was contrary to the provisions of the bankruptcy act forbidding preferences. The transactions of July 14, 1898, including the transfers from Wentworth to French were also a fraud upon the bankrupt act in that they prevented and were intended to prevent his rights in the shares from being administered in bankruptcy. The transfers were also fraudulent at common law in that they were intended to place Wentworth's right in the shares beyond the reach of his creditors. The transfers should therefore be declared void and set aside. The decree dismissing the bill with costs must be reversed, and the case remanded to the Superior Court with directions to enter a decree for the plaintiff, in accordance with this decision.

So ordered.

LUIGI STORTI vs. COMMONWEALTH.

LUIGI STORTI'S CASE.

Suffolk. May 6, 1901. — May 7, 1901.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

Whether the provision of the Massachusetts Declaration of Rights that "No magistrate or court of law shall . . . inflict cruel or unusual punishments" applies to punishments provided by statutory enactment, *also*, whether the prohibition extends to punishments which are unusual but not cruel, *quære*.

St. 1898, c. 326, § 6, providing that the punishment of death shall be inflicted by causing a current of electricity to pass through the body of the convict, does not inflict a cruel or unusual punishment within the meaning of article 26 of the Massachusetts Declaration of Rights. The punishment is death; and the adoption of new means, for the purpose of producing death as swiftly and painlessly as possible, is not forbidden by the Constitution, although the means adopted be the result of discoveries of recent science not previously known in Massachusetts.

The provision of St. 1898, c. 326, § 2, that after delivery to the warden of the State prison of a convict sentenced to death, the prisoner shall be kept in a special cell and only certain persons allowed access to him without an order of court, does not and is not intended to prevent the presence of the prisoner in court in any matter which properly may be brought up in court and which by the course of law or treaty requires his presence.

The provision of St. 1898, c. 326, § 3, leaving it to the warden of the State prison to select the day within the week appointed by the court on which a prisoner sentenced to death shall be executed, was not intended to aggravate the prisoner's distress by enhancing his suspense, and does not inflict a punishment. The purpose is humane, and the possible uncertainty for a brief period as to the exact time of execution is not a part of the punishment.

TWO PETITIONS by and in behalf of Luigi Storti, convicted of murder in the first degree and sentenced to death, one for a writ of error and the other for a writ of habeas corpus, both filed April 30, 1901.

The prisoner at the time of filing the petitions was held by the warden of the State prison, having been sentenced to suffer death by electricity under St. 1898, c. 326, at some time in the discretion of the warden within the week beginning April 7, 1901, which by respite had been extended to some time within the week beginning May 12, 1901.

The question raised by both petitions was whether the punishment inflicted by the statute is cruel or unusual in violation

of article 26 of the Massachusetts Declaration of Rights. The material sections of the statute are as follows :

“Section 2. When a person is sentenced to the punishment of death he shall be confined in a jail or prison in the county in which such sentence is pronounced until within ten days of the first day of the week appointed for the execution of the sentence. He shall, within such ten days, and at a time chosen by the sheriff of the county, be conveyed as secretly as may be, by the sheriff or such deputy as he may name, to the state prison, where the sentence is to be executed, and be delivered, together with the warrant, to the warden or the officer performing the duties of warden. From the time of such delivery until the infliction of the punishment of death upon him, unless he shall be lawfully discharged from such imprisonment, the convict under sentence shall be kept in a cell provided for the purpose, and no person shall be allowed access to him without an order of the court, except the officers of the prison, his counsel, his physician, a priest or minister of religion, if he shall desire one, and the members of his family.

“Section 3. The sentence of death shall be executed by the warden of the state prison, or by a person or persons acting under the direction of the warden. Unless the governor pardons the offence, commutes the punishment therefor, or respites the execution, as provided by law, the execution shall be done within the week appointed by the court; and in case the execution is respited the sentence shall be executed within the week beginning on the day next after the day on which the term of respite expires. The execution shall be done upon such day as the warden shall select within the week determined as aforesaid, and at an hour between midnight and sunrise; but no previous announcement shall be made, except to the persons who shall be permitted to be present at such execution, as hereinafter provided.”

“Section 6. The punishment of death shall in every case be inflicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, and the application of such current must be continued until such convict is dead.”

Article 26 of the Declaration of Rights is as follows :

"No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments."

The cases upon both petitions were heard by *Loring, J.*, who reserved them for the consideration of the full court in order that this court might make such order therein as in their opinion law and justice might require.

The second assignment of error alleged that the punishment provided by the statute was in fact unusual, the third assignment that it was in fact cruel or unusual and the fourth assignment alleged that the statute provided for the infliction of the punishment of death by means which in fact are cruel, unusual, of an uncertain character, and which in fact necessitate for their successful action a remote combination of circumstances circuitously affecting the functions of organic life, by secret and invisible means, which means, in fact, are unusual, cruel and unknown to the laws of this Commonwealth, and which punishment is contrary to the provisions of article 26 of the Declaration of Rights and contrary to the provisions of the Constitution of Massachusetts.

The justice in his reservation made the following report of his findings upon the above allegations of fact contained in the assignments of error:

"Against the objection of the Attorney General, the second, third, and fourth assignments of error came on to be heard before me as assignments of errors in fact. It was conceded by the Commonwealth that the petitioner in this writ of error is a citizen of the King of Italy; that the punishment of death by electricity has never been inflicted in this Commonwealth and that electricity has never been used as a means of punishment for any offence in this Commonwealth.

"I find as a fact that if electricity is properly applied it is necessarily fatal, and causes death practically instantaneously; that in causing death it is more speedy, less painful, and more humane than is hanging. I further find as a fact that it is not of an uncertain character; that it does not in fact necessitate for its successful action a remote combination of circumstances circuitously affecting the functions of organic life by secret and invisible means.

"I also find that by the Revised Statutes of Maine (1883), by the Revised Statutes of Illinois (1899), Revised Statutes of Arizona (1887), Statutes and Code of Washington (1891), Code of Tennessee (1896), Revised Statutes of Florida (1892), Code of Alabama (1896), Revised Statutes of New York (1829), and Revised Statutes of Ohio (1890), it is provided that the means of carrying into effect the sentence of death shall be by hanging by the neck; and that by the statutes of Ohio (revision of 1900) it is provided that the means of carrying into effect the sentence of death shall be by causing a current of electricity to pass through the body sufficient to cause death; and that a statute was enacted in New York in January, 1888, providing that the punishment of death shall be inflicted by causing a current of electricity to pass through the body of the convict, and such current must be continued until the convict be dead.

"I find as a fact that the second, third, and fourth assignments are not true."

C. W. Rowley, for the plaintiff in error.

W. M. Stockbridge, for the petitioner.

F. H. Nash, Assistant Attorney General, for the Commonwealth.

HOLMES, C. J. These proceedings are respectively a writ of error and a petition for a writ of habeas corpus. Both are intended to raise the same issue, that the punishment, death by electricity, to which the said Storti has been sentenced, under St. 1898, c. 326, § 6, is "cruel or unusual" within article 26 of the Massachusetts Declaration of Rights. Upon the writ of error, the plaintiff in error insisting that the assignment was of error in fact, evidence was heard, the plaintiff in error being brought into court by habeas corpus to be present at the hearing, and the presiding justice found that the assignment was not true. The independent petition for habeas corpus was reserved by agreement of parties for hearing by the full court at the same time with the writ of error.

In the view which we take of the case it is unnecessary to consider any question of procedure, either as between the two proceedings adopted or as to matters of detail arising under each. We therefore pass all such matters on one side. It also is unnecessary to consider whether the before-mentioned article

of our Declaration of Rights is to be limited in its application to the action of magistrates so far as they are left to themselves and the common law, or whether it is to be taken to embody a large general principle equally binding upon all branches of the Government, or at least binding upon magistrates and courts of law even when the Legislature has undertaken to establish a punishment by its act. Finally it is unnecessary to go into any nice argument upon the words of the article, and to decide whether, inasmuch as those words are "cruel or unusual," not "cruel and unusual," a punishment which is unusual but is not cruel is forbidden by them.

Taking all the preliminaries most favorably for the prisoner, we are clearly of opinion that the Constitution is not contravened by the act, and we render our opinion at once that we may avoid delaying the course of the law and raising false hopes in his mind. The answer to the whole argument which has been presented is that there is but a single punishment, death. It is not contended that if this is true the statute is invalid, but it is said that it is not true, and that you cannot separate the means from the end in considering what the punishment is, any more when the means is a current of electricity than when it is a slow fire. We should have thought that the distinction was plain. In the latter case the means is adopted not solely for the purpose of accomplishing the end of death but for the purpose of causing other pain to the person concerned. The so called means is also an end of the same kind as the death itself, or in other words is intended to be a part of the punishment. But when, as here, the means adopted are chosen with just the contrary intent, and are devised for the purpose of reaching the end proposed as swiftly and painlessly as possible, we are of opinion that they are not forbidden by the Constitution although they should be discoveries of recent science and never should have been heard of before. Not only is the prohibition addressed to what in a proper sense may be called the punishment but, further, the word "unusual" must be construed with the word "cruel" and cannot be taken so broadly as to prohibit every humane improvement not previously known in Massachusetts. *People v. Durston*, 119 N. Y. 569; *S. C. In re Kemmler*, 136 U. S. 436.

The suggestion that the punishment of death, in order not to be unusual, must be accomplished by molar rather than by molecular motion seems to us a fancy unwarranted by the Constitution.

No doubt a means might be adopted which, although adopted only as a means, practically would be part of the punishment and would have to be considered as such. But such a case is not presented by a means chosen precisely because it is instantaneous. There was a hint at an argument based on mental suffering, but the suffering is due not to its being more horrible to be struck by lightning than to be hanged with the chance of slowly strangling, but to the general fear of death. The suffering due to that fear the law does not seek to spare. It means that it shall be felt.

Some criticism was addressed to minor details of the law. The provision that after delivery to the warden of the State prison the prisoner shall be kept in a special cell and only certain persons allowed access to him without an order of the court, does not prevent, and by its true construction is not intended to prevent, the presence of the prisoner in court in any matter which properly still may be brought up in court, and which by the course of law or treaty may require his presence, (see *Commonwealth v. Cody*, 165 Mass. 133, 138,) as was exemplified in this case.

Leaving it to the warden to select the day of the week appointed by the court for the execution was not intended to aggravate the prisoner's distress, by enhancing his suspense. The purpose is humane, and the possible uncertainty for a brief period as to the exact time is not a part of the punishment. See further *Commonwealth v. Costley*, 118 Mass. 1, 35.

Judgment to stand ; writ of habeas corpus denied.

CHARLES O'MALLEY vs. TWENTY-FIVE ASSOCIATES.

Worcester. October 2, 1900. — May 21, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & HAMMOND, JJ.

In the absence of warranty or misrepresentation a landlord is liable to his tenant only for a failure to disclose hidden defects the actual existence of which was known to him.

The owner of a tenement house, maintaining it as such, is not liable to one of the tenants, or a person having his rights, for an injury caused by the breaking of a hook attached to a crane on the building, if he did not know that the hook was defective.

Whether the employee of a coal dealer, who is injured by the breaking of a hook attached to a crane on a tenement house when hoisting a basket of coal for delivery to one of the tenants, has the same rights against the landlord that the tenant would have, *quere*.

TORT by the employee of a coal dealer against a corporation owning and maintaining a tenement house in Clinton for injuries caused to the plaintiff by the breaking of a hook at the end of a rope running over a wheel attached to the building, while the plaintiff was hoisting a basket of coal for delivery to one of the tenants of the defendant. Writ dated March 8, 1894.

The case was first tried in the Superior Court, before *Hopkins, J.*, who directed a verdict for the defendant. The plaintiff alleged exceptions which were sustained by this court in a decision reported in 170 Mass. 471.

At the new trial in the Superior Court, before *Gaskill, J.*, the defendant asked the judge to make the following rulings:

1. There was no sufficient evidence to warrant a verdict for the plaintiff. 2. In order to recover, the plaintiff must prove that the apparatus had become defective since the tenement was let to the tenant Dias, and the defendant is not liable for an original defect in the apparatus. 3. The tenant took the apparatus in the condition in which it was at the time of the letting, and the landlord is not liable for the condition of the apparatus at the time of the letting, even if the jury should find that it was reserved by the landlord under the conditions before stated.

The judge declined to give the first ruling and upon the question raised by the second and third rulings prayed for, instructed the jury as follows:

“ Now with reference to the allegation of the plaintiff that that original fall and tackle as put originally there was defective at the outset, and was unsafe for the purpose for which it was intended. The law which I give to you with reference to that is this, — that if that tackle when originally put in place, and when the tenement upon the fifth floor was rented to Dias, was in a condition such that Dias knew or ought to have known what its condition was, then if no change took place in that condition down to the time of the accident, the plaintiff cannot recover. If, however, you find that Dias did not know and could not by the exercise of ordinary inspection and care have known what the condition of that tackle was, but that the defendant did know or ought to have known that it was unsuitable and unsafe for the use for which it was contemplated, then so far as the original construction was concerned there might be liability but only upon that ground, because the general rule is that a tenant in going into a tenement hired by him, which he has opportunity to inspect, nothing hidden, takes that tenement exactly as he finds it, and he cannot impose upon the landlord the duty to change that tenement or its appliances ; he takes his risk ; he is not obliged to hire, but if he sees it and there is nothing hidden, then he assumes so far as the defendant is concerned, or the landlord, the condition of things as it is.

“ The variation from that proposition which I have made to you is important if you find it to have existed, and that is, if Dias did not know although it was apparent, or ought not reasonably to have been expected to know from inspection of the premises that that was unsuitable, and the defendant did know or ought to have known that it was unsuitable, then there is an element of responsibility and obligation and of possible liability.”

The defendant excepted to the refusal to give the rulings prayed for and to the instructions given so far as they differed from those requested. Instructions not excepted to were given as to reservation of control of the apparatus in question by the landlord and all other parts of the case. The evidence was substantially the same as at the former trial with the addition of the evidence then excluded and now admitted under the decision of this court. A statement of the evidence at the former

trial and of the evidence then offered and excluded will be found in 170 Mass. 471.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

F. P. Goulding, (J. Smith with him,) for the defendant.

J. W. Corcoran, for the plaintiff.

HOLMES, C. J. This is an action for personal injuries caused by the fall of a basket of coal upon the plaintiff's head. The plaintiff was hoisting the coal to a tenement in a building owned by the defendant, by means of a pulley and tackle attached to a crane by a hook, and the hook broke. The case has been tried a second time, and the evidence at the second trial was so similar to that which already has been held to entitle the plaintiff to go to the jury that we assume without further argument that the defendant's first exception is disposed of by the former decision. 170 Mass. 471.

But for reasons which sufficiently appear on the face of the report, the former decision cannot be taken to lay down any general principle. It states the right of the plaintiff to go to the jury and the admissibility of certain evidence now admitted, but it does not establish the ground of the defendant's liability, or help us in deciding whether the second ruling asked by the defendant should have been given or whether the instruction given in place of it was right.

The instruction asked was that "in order to recover, the plaintiff must prove that the apparatus had become defective since the tenement was let to the tenant Dias, and the defendant is not liable for an original defect in the apparatus." The jury were instructed that if the tenant did not know and could not have known by the exercise of ordinary care and inspection what the condition of the tackle was, but the defendant did know or ought to have known that it was unsuitable, they might find for the plaintiff on the ground of the original construction. The ruling, it will be seen, made the defendant answerable not only for what it knew, but for what the jury might say that it ought to have known.

The knowledge of the tenant of course would be immaterial except on the hypothesis that the plaintiff was to recover, if at all, as standing on the tenant's right. We express no opinion

as to the validity of this or any other ground of recovery, but if the recovery was to be on this ground we are of opinion that the instruction went too far and that the ruling asked should have been given.

There was no evidence that the defendant knew of any secret defect in the hook which would make it a trap to a tenant not equally informed. If, then, the hoisting apparatus had been let with the upper tenement to which it was attached, the principle of *caveat emptor* would have been applied. *Woods v. Naumkeag Steam Cotton Co.* 134 Mass. 357. *Bowe v. Hunking*, 135 Mass. 380, 384.

If merely the use of the hoisting apparatus was let in connection with this and other tenements, the rule as to the original condition of the apparatus would be the same. It would be anomalous to apply one rule to the principal object demised and another and severer one to something incidentally annexed. No doubt when the lessor retains control he owes a duty, and, in some cases where the point which we now are considering was not before the mind of the court, the duty has been spoken of in a general way as a duty to keep the article or place reasonably safe. But when attention has been directed in any way to the condition of things at the beginning of the lease, it has been recognized as the general rule that the tenant must take things as he finds them, and if they then are unsafe, cannot complain. There is no implied undertaking or duty on the landlord's part to make things better than they are. *Quinn v. Perham*, 151 Mass. 162. *Moynihan v. Allyn*, 162 Mass. 270. *Freeman v. Hunnewell*, 163 Mass. 210. *Roche v. Sawyer*, 176 Mass. 71.

The only extension of liability beyond this limit is in the case of hidden defects actually known to exist. As the landlord makes no contract concerning the condition of the premises at the time, the only ground on which he can be held is that he unconscionably is leading the other party into a trap. *Minor v. Sharon*, 112 Mass. 477, 487. *Cowen v. Sunderland*, 145 Mass. 363, 364. The duty when it exists is only a duty to inform the tenant of the danger, and "there can be no such duty without knowledge of the defect." *Bowe v. Hunking*, 135 Mass. 380, 383. The suggestion of a stricter rule in *Lynch v. Swan*, 167 Mass. 510, 512, is merely a dictum, and is not sustained by the

cases cited, which are cases dealing with knowledge of defects possibly arising after the letting. The duty to use reasonable care to keep a staircase safe, up to the standard of the date of the lease, might not be met by a proof of ignorance that the staircase had decayed. *Lindsey v. Leighton*, 150 Mass. 285. *Leydecker v. Brintnall*, 158 Mass. 292. *Wilcox v. Zane*, 167 Mass. 302.

Our decision seems to us in accord with the more authoritative cases. *Doyle v. Union Pacific Railway*, 147 U. S. 413, 424, *et seq.* *Edwards v. New York & Harlem Railroad*, 98 N. Y. 245. The views expressed in *Willcox v. Hines*, 100 Tenn. 538; *S. C.* 96 Tenn. 148, 328, and 34 L. R. A. 824, do not command our assent. No doubt a duty to take reasonable care to secure reasonable safety might be imposed upon landlords on grounds of policy, irrespective of the condition at the date of the lease. But we see no sufficient reason for departing from the general rule when we consider the relation of landlord and tenant from the point of view of contract, and if there is no implied undertaking to give the tenant more than he hires, we can see no ground for holding a landlord liable in tort for not making the same improvement or for not mentioning what he did not know. In the opinion of a majority of the court the exceptions should be sustained.

So ordered.

BAXTER D. WHITNEY vs. FITCHBURG RAILROAD COMPANY.

Worcester. October 2, 1900. — May 21, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, HAMMOND,
& LORING, JJ.

The owner of a mill pond created by damming a natural stream conveyed to a railroad company, for the purpose of constructing and maintaining its road, land on both sides of the pond "with all privileges, and appurtenances thereto belonging," "Reserving, however, to the grantor, his heirs and assigns forever the right to all the water power created by a dam on the premises of the present height of the rolling part of the dam now standing on the premises." *Held*, that by this reservation the owner reserved the right to have all the water that naturally would come down the stream to the dam flow over it, and that any

substantial diversion of the water by the railroad company, as it passed over its land before reaching the dam, would constitute an interference with the rights of the mill owner which would be enjoined in equity.

A diversion of water from a mill pond amounting to twenty-six one hundredths of a horse power a day, the total power of the mill owner's privilege being two hundred horse power a day, is a substantial diversion which, if unauthorized, will be enjoined in equity. Whether an unauthorized diversion not substantial would be enjoined, *quære*.

BILL IN EQUITY to restrain the defendant from taking water from the plaintiff's mill pond and for the assessment of damages caused by such taking, filed August 10, 1894.

In the Superior Court the case was reserved by *Gaskill, J.*, for the consideration of this court on the bill, answer and agreed facts.

The following appeared from the agreed facts: In 1849, the plaintiff owned a large tract of land in Winchendon, in the county of Worcester, which he used as a mill estate, there being thereon a large mill with a water privilege consisting of an artificial or flowed pond supplied by a natural stream. On October 15, 1849, the plaintiff made with the Cheshire Railroad Company the indenture which is described in the opinion of the court, under which the defendant claimed the right to use the water taken, and which contained the reservations under which the plaintiff denied its right to do so. This indenture conveyed to the railroad company, for the purpose of constructing and maintaining its road, land on both sides of the plaintiff's mill pond. Shortly after 1849 the railroad company constructed its tracks along the mill pond over the land conveyed by the indenture, crossing the pond at or near the plaintiff's dam. Since then the plaintiff has maintained his flowage at and not above the height specified by the terms of the indenture.

By St. 1887, c. 389, the Cheshire Railroad Company was authorized to unite and consolidate with the Fitchburg Railroad Company, the uniting corporations to form one corporation under the name of the Fitchburg Railroad Company, and by the terms of the act the united corporation, the defendant, was to have all the rights, powers, privileges and immunities, and be subject to all the duties and liabilities of the uniting corporations. The consolidation was made as authorized.

The water in the stream which supplies the plaintiff's mill

with power, other than that saved by reservoirs, would not amount to over ten horse power in the dry seasons, and with the present storage reservoirs makes a power at the mill of about two hundred horse power, varying as to the quantity of water in different seasons. The defendant, some years since, asked of the plaintiff leave to put in a pipe entering the canal which carries the water from the plaintiff's pond to his mill wheels below the gates through the masonry at the side of the canal and on land owned and occupied by the plaintiff. This license was granted, and for many years the defendant maintained by this license a pipe by which it took water from the plaintiff's canal, using it in its railroad operations. Subsequently this license was revoked by the plaintiff, and the defendant abandoned the pipe, but has since laid a new pipe through the masonry at the side of the canal above the gates, within the limits of its location, and by means of this pipe took and still takes water from the pond over the land within the limits of its location. The place where the pipe now enters the pond is within the tract of land which was conveyed to the Cheshire Railroad Company by the plaintiff by the indenture of October 15, 1849.

It is agreed that the amount of water taken by the defendant from the plaintiff's pond is about forty thousand gallons a day, and that this would amount to twenty-six one hundredths of a horse power a day. The total power of the plaintiff's privilege is two hundred horse power a day.

The water taken by the defendant is used in its locomotive engines for the purpose of generating steam.

The case was submitted on briefs to all the justices except *Lathrop, J.*

F. B. Smith, T. H. Gage, Jr. & W. S. B. Hopkins, for the plaintiff.

G. A. Torrey, for the defendant.

MORTON, J. This is a bill in equity to restrain the defendant from taking water from the plaintiff's mill pond and for the assessment of damages caused by such taking. The case was reserved on the bill, answer and agreed facts. The agreed facts show that in 1849 the plaintiff was the owner of a large tract of land in Winchendon on which was a mill, and a dam, mill pond and water privilege. The water privilege furnished power to

the mill. The mill pond was an artificial pond and was supplied by a natural stream. It is the taking from this pond that is complained of, and the agreed facts show that the quantity taken is a substantial quantity. The defendant seeks to justify the taking as a riparian proprietor under and by virtue of an indenture executed in 1849 between the plaintiff and the Cheshire Railroad Company to whose rights the defendant has succeeded. It is conceded that the Cheshire Railroad Company became under the indenture of 1849 a riparian proprietor on the pond and stream. But the plaintiff contends that under the reservations contained in the indenture neither the Cheshire Railroad Company nor the defendant as its successor has any right to take water from the pond and stream as a riparian proprietor or otherwise in such quantity as to constitute a substantial interference with the water power reserved in the indenture. And we are of opinion that this contention is right. By the indenture the plaintiff conveyed to the Cheshire Railroad Company its successors and assigns a portion of the tract referred to above "with all privileges, and appurtenances thereto belonging, . . . for the purposes and use of constructing, using and maintaining a railroad thereon" on condition that the land should revert to the plaintiff if it should cease to be used for a railroad or for a public thoroughfare by the grantee or its assigns. The plaintiff expressly reserved, however, in the indenture to himself "his heirs and assigns forever the right to all the water power created by a dam on the premises of the present height of the rolling part of the dam now standing on the premises," and also of flowing the water in the pond six feet and a half above the cap of the rolling part of the dam as it then was unless the county commissioners should certify within a certain time that the flowing might be raised seven feet above the cap without endangering the railroad, in which case the grantor reserved to himself and his heirs and assigns the right to flow to the height of seven feet. In addition to these the indenture contained other reservations to the plaintiff his heirs and assigns relating to the dam, to the flow of the water, to canals and flumes, to the right to construct and maintain gates, to the right to enter and repair and to other matters relating to the water privilege. It also contained a covenant on the part of the railroad company that the plaintiff his

heirs and assigns should have the "right to use and enjoy the rights and privileges hereinbefore reserved to him and them." Manifestly, we think, one object of the indenture was to reserve to the plaintiff his heirs and assigns the full and unobstructed and continued use and enjoyment of the water privilege. By reserving to himself "his heirs and assigns forever the right to all the water power created by a dam on the premises of the present height of the rolling part of the dam now standing on the premises," the plaintiff reserved to himself the right to have all the water that would naturally come down the stream to the dam flow over it, and any substantial diversion by the defendant of water which had once got into the stream and which but for such diversion would have flowed over the dam would constitute an interference with the plaintiff's rights. *Bliss v. Rice*, 17 Pick. 23. Though the language is that of reservation rather than of grant, the plaintiff's rights are not affected, it seems to us, by that circumstance. *Bowen v. Conner*, 6 Cush. 132. Indeed, strictly speaking, a reservation operates by way of implied grant. It is not necessary to consider whether the plaintiff would be entitled to relief in case of any unauthorized diversion whether the quantity diverted was substantial or not. *Appleton v. Fullerton*, 1 Gray, 186. The quantity diverted amounted to twenty-six one hundredths of a horse power a day and was, as already stated, a substantial quantity.

The acts of the parties, though not decisive, would seem to be more in harmony with the construction which we have adopted than with any other view. The defendant applied to the plaintiff for leave to put a pipe into the canal on the plaintiff's land. Permission was granted and for many years the defendant took water by means of the pipe and used it in its railroad operations. Subsequently the license was revoked and then the defendant laid the pipe which is complained of and which is within its own premises. If the defendant understood that it had the right which it now claims there would seem to have been no good reason why it should have gone to the plaintiff for permission to take water from the canal on his land.

The result is that we think that there should be a decree for the plaintiff.

So ordered.

CHARLES U. COTTING & another, executors, vs. JOHN
FOSTER.

Suffolk. November 14, 1900. — May 21, 1901.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

An action on a negotiable promissory note indorsed to another by the payee must be brought by the indorsee in his own name and not in the name of the payee, at any rate not without his consent.

If an indorsement on a promissory note conveys only a right to collect a part of it, it can operate only as an assignment of such part, and the assignee cannot maintain an action at law either for the part or the whole in his own name, nor in the name of the assignor without his consent.

CONTRACT in the name of the executors of the will of John Foster, late of Boston, on a promissory note, made by John Foster of Manchester, New Hampshire, alleged to have been assigned and transferred by John Foster, late of Boston, to George Foster in trust for certain persons, for whose benefit the suit was alleged to have been brought. Writ dated May 4, 1899.

The note as set forth in the declaration was as follows: “\$2352.93/100. Boston, January 1, 1880. For value received I promise to pay to the order of John Foster, of Boston, twenty-three hundred fifty-two dollars 93/100 on demand, with interest. John Foster.” [of Manchester.]

The alleged assignment indorsed on the note was as follows: “Pay, when able, three fourths of the within note and interest to George Foster for the benefit, share and share alike, of his sons George S., Charles E., and Herman, and whenever the above payments shall *have been made in full* your liability on the within-written promise shall cease. John Foster.” [of Boston.]

The declaration further alleged, that John Foster of Boston assigned and transferred the note to George Foster, in trust, by the following letter: “Boston, April 6, 1880. Dear Brother, Enclosed herewith please find note of your son, John Foster, dated January 1, 1880, on demand, and interest, for \$2352.93, twenty-three hundred fifty-two 93/100 dollars, which you will please accept and hold for the purposes set forth in indorsement

on the same. Yours affectionately, John Foster. Mr. Geo. Foster, Manchester, N. H."

The defendant pleaded in abatement that the action was brought and prosecuted without the authority or consent of the nominal plaintiffs, and also without authority to represent the estate of George Foster, eighteen years before deceased.

The plaintiffs, executors of the will of John Foster, late of Boston, moved that the action be dismissed on the ground that it was brought and prosecuted without their authority or consent.

The Superior Court sustained the motion and dismissed the action, and the attorneys of record for the plaintiffs, "representing the estate beneficially interested in said suit," appealed from the order.

O. Storer, for the plaintiffs.

A. S. Hall, (*C. H. Tyler* with him,) for the defendant.

HAMMOND, J. This is an action upon a promissory note, brought in the names of the executors of the payee for the benefit of his estate and of the estate of George Foster, to whom the note had been delivered by the payee with a certain writing indorsed thereon. In the court below the action was dismissed on the motion of the plaintiffs themselves, and the case is before us upon an appeal from the order of dismissal by certain attorneys representing themselves as "attorneys of record for the plaintiffs, and representing the estate beneficially interested in said suit." We construe this as an appeal by those beneficially interested in the suit, except the estate of John Foster, made through their attorneys.

The note is negotiable and the writing upon the back of it is in the form of a conditional indorsement. If therefore the writing conveyed to George Foster the whole note and the right to collect the whole, then upon the fulfilment of the condition he was an indorsee, and the action should have been brought by the personal representatives of him as such, and cannot be maintained in the name of the personal representatives of the payee, at least against their objection. *Mosher v. Allen*, 16 Mass. 451. See also *Troeder v. Hyams*, 153 Mass. 536; Story, Notes, (7th ed.) § 149; *Robertson v. Kensington*, 4 Taunt. 80.

If, on the other hand, the writing conveyed to George only a part of the note and the right to collect only a part, then it can

operate only as an assignment of a part, and on well settled principles his representatives cannot maintain an action at law for that part in their own names, nor for the whole in their own names, or in the names of the representatives of the assignor without their consent. See *Flint v. Flint*, 6 Allen, 34, and *James v. Newton*, 142 Mass. 366, and authorities therein cited. Upon either view of the writing, therefore, this action is not maintainable.

The cases of *Grover v. Grover*, 24 Pick. 261, and *Merrill v. New England Ins. Co.* 103 Mass. 245; cited by the appellants, are plainly distinguishable from this case. In the first case there was a gift of the whole note without any indorsement thereon, and, in the second, the question was whether the pledgee, having been appointed here an ancillary administrator of the estate of the pledgor, could maintain as such administrator an action in this State upon the policy notwithstanding the principal administrator in Illinois had brought an action in that State upon the same policy and that action was still pending. The policy was not negotiable. And in the language of the court the interest of the pledgee was "not a mere order for a part of the proceeds, but" extended "to the whole policy alike." 103 Mass. p. 250.

Order dismissing the action affirmed.

MARY LEAHAN vs. CAROLINE R. COCHRAN.

Suffolk. November 14, 1900. — May 21, 1901.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

A householder maintaining a conductor for carrying water from his roof emptying on a shallow granite gutter crossing a public sidewalk, which by its natural and intended use causes ice to form, rendering the sidewalk dangerous for public travel, is liable to one injured thereby for maintaining a public nuisance, although the conductor and granite gutter had been constructed before he bought the house and he never had been requested to change them.

In an action at common law to recover for an injury caused by ice on a sidewalk formed by reason of a conductor and gutter maintained by the defendant, Pub. Sts. c. 52, § 19, requiring notice of the time, place and cause of injury, has no application.

TORT to recover for injuries sustained by falling on the public sidewalk adjoining the defendant's premises on East Newton Street in Boston on ice formed by reason of a conductor carrying water from the defendant's roof to an open gutter crossing the sidewalk. Writ dated April 28, 1899.

At the trial in the Superior Court, before *Sheldon, J.*, the plaintiff introduced evidence tending to show, that the defendant was the owner of the building and land at the corner of East Newton and James Streets in Boston from 1864 to and including December 21, 1898, and that during all that time a conductor was affixed to the outside of the building to carry water from the roof of the building to the sidewalk adjoining it on East Newton Street. There was also an open gutter upon and across the sidewalk extending from the foot of the conductor to the street. This open gutter was of granite and about eight inches wide and had in the centre a groove about three inches across and one inch deep, being in two pieces of unequal length with a depression where the ends joined. The sidewalk on each side of the granite gutter was of brick and the bricks adjoining the edge of the granite gutter were depressed in places about one inch below the edge of the gutter. About eight o'clock in the morning of December 21, 1898, ice had formed on each side of and on top of this gutter, and the groove in the gutter was filled with ice, the ice apparently having been formed there by water deposited by the conductor from the roof of the defendant's building, and more water from the conductor was then running over the surface of the ice. In this condition of affairs and at this time the plaintiff while in the exercise of due care by reason of the water and ice slipped and fell, and was injured. There was no evidence that the defendant erected or constructed the building, the conductor, the gutter or sidewalk mentioned, and it was admitted that the conductor complained of had been in the same condition that it was at the time of the accident ever since the defendant became the owner of the premises. There was no evidence that the defendant was ever requested to reform the nuisance complained of, if it was a nuisance, and the plaintiff testified that she never complained to the defendant or her representative of the condition of the conductor or gutter, and never requested that the condition of either the conductor

or gutter be remedied. This was all the evidence material to the case. No notice under Pub. Sts. c. 52, §§ 19, 21, and acts in amendment thereof, was given.

At the close of the plaintiff's case, the defendant requested the judge to rule that the plaintiff could not maintain this action: First, because on all the evidence the plaintiff could not recover. Second, because it appeared that the defendant did not construct or create the building, the conductor, the gutter or sidewalk mentioned, and that she had not been requested to remedy the same. Third, because there was no evidence tending to show that the defendant constructed or created the nuisance complained of, nor that she had been requested to remedy the same.

These rulings the judge refused to give and the defendant excepted. The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

G. C. Abbott, for the defendant, submitted the case on a brief.

C. W. Bond, for the plaintiff.

HAMMOND, J. The evidence tended to show that affixed to the house of the defendant was a conductor, constructed and used for the purpose of carrying water from the roof to the public sidewalk adjoining; that there was a groove in the sidewalk, extending from the end of the conductor to the outer edge of the sidewalk; that the water from the conductor had frozen in and about the groove upon the sidewalk, and that the plaintiff, while travelling in the exercise of due care over the ice, was injured. The evidence warranted a finding that in the winter the natural and probable result of the situation would be the formation of ice upon the sidewalk, which would be dangerous to public travel and therefore a public nuisance.

At the time of the accident the defendant had been the owner of the house for several years, but there was no evidence that the defendant constructed the building, the conductor, the groove or the sidewalk; and it appeared that the condition of the conductor at the time of the purchase was and ever since had been the same as at the time of the accident. There was no evidence that the defendant ever had been requested by the plaintiff or by any other person to reform the nuisance, or that the plaintiff ever complained of it to the defendant.

The action is at common law, and the question whether the notice requisite to the maintenance of an action under Pub. Sta. c. 52, § 18, was given is immaterial. It is not argued that the evidence did not warrant a finding that this conductor in its natural operation did create a nuisance in the highway. The only question presented is whether the court erred in declining to give the second and third rulings requested by the defendant. These requests raise the question whether, the situation being the same as at the time of the purchase by the defendant, she can be held answerable to the plaintiff in the absence of any request made to her to reform the nuisance.

There can be no doubt that in the case of a private nuisance the general doctrine in this country, following *Penruddock's case*, 5 Co. 205, is that the grantee of land upon which at the time of the grant there exists a nuisance created by his predecessors in title is not responsible merely because he has become the owner of the land. His liability arises from his knowingly continuing the nuisance; and generally it may be stated that he is not answerable for continuing the nuisance in its original state unless he has had notice to abate, or at least until he has had knowledge that it is a nuisance and injurious to the rights of others; and while there is some dissent from this doctrine (see opinion of Denio, J. in *Brown v. Cayuga & Susquehanna Railroad*, 2 Kernan, 486; of Strong, J. in *Hubbard v. Russell*, 24 Barb. 404; and of Manning, J. in *Caldwell v. Gale*, 11 Mich. 77), still it must be regarded as the law of this Commonwealth. *McDonough v. Gilman*, 3 Allen, 264, and cases cited.

The cases are numerous in which this doctrine has been applied to private nuisances, but with the exception of *Woram v. Noble*, 41 Hun, 898, we have seen no case where the doctrine has been directly applied to the case of a public nuisance, although in *Wenelick v. McCotter*, 87 N. Y. 122, and *Dodge v. Stacy*, 39 Vt. 558, the court seems to have failed to notice any difference in this respect between private and public nuisances.

We think the rule should not be extended to a public nuisance like that in this case. The reason generally given for the rule is that in the absence of any notice to the contrary, the grantee has the right to assume that the structures upon the land are rightfully there, and that even where they may seem to interfere

with the usual rights appurtenant to other estates he may properly assume that the right thus to interfere has been lawfully obtained; and it is said that it would be inequitable to subject him to damages until he has had notice that in maintaining the structure or work complained of he is infringing upon the rights of others.

The reason of the rule is not applicable to a case like this. The conductor in its natural and intended use caused ice to form upon the sidewalk, which, being dangerous to public travel, was a public nuisance. No matter how often the ice was formed, the right thus to encumber the street could not be lawful. The right to create such a nuisance was not a matter of grant, nor could it have been acquired by prescription. *Holyoke v. Hadley Co.* 174 Mass. 424, 426. *New Salem v. Eagle Mill Co.* 138 Mass. 8. In so far as the conductor by its natural operation caused the formation of such ice, it was creating a nuisance. The defendant as owner must have known this or must be presumed to have known it. In such a case, the reason for the requirement of a notice does not exist, and we see no reason why the rule should be applied. See *Matthews v. Missouri Pacific Railway*, 26 Mo. App. 75.

Exceptions overruled.

ISAAC BULLARD & others vs. NEW YORK, NEW HAVEN,
AND HARTFORD RAILROAD COMPANY & others.

Norfolk. November 22, 1900. — May 21, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHEROP, BARKER,
HAMMOND, & LORING, JJ.

A deed to a railroad company conveyed certain lots of land on a street called Regent Street. Another deed of the same and other grantors conveyed to the same company other lots on the same street. The express descriptions excluded Regent Street. The first deed then contained this clause "Also intending to convey to the grantee all my rights in said Regent Street above mentioned." The second deed contained the clause "Also intending to convey to the grantee all our rights in said Regent Street." The grantors owned many other lots on Regent Street, which was over twenty-seven hundred feet in length. Subsequently a portion of Regent Street adjoining these other lots was discontinued as a highway and taken by the railroad company for the purposes of its road. *Held*, that the deeds above described conveyed the fee of the grantors only in

those parts of Regent Street adjoining the lots conveyed to the railroad company and not in those parts of it adjoining the lots retained by the grantors, and that the owners were entitled to any damages they could prove for the taking of their property for railroad purposes.

If land which has been taken for a highway is subsequently taken by a railroad company for the purposes of its road, the highway being discontinued, the new use to which the land is subjected may be more onerous to the landowner than the former one, and he is entitled to recover damages, if he can prove them.

PETITION for the assessment of damages under St. 1896, c. 257, on account of the taking for railroad purposes, by a decree of the Superior Court made upon a petition for the alteration of the grade crossing of Milton Street and the respondent's railroad in the town of Hyde Park, of a certain parcel of land formerly a part of a public way called Regent Street and discontinued as a part of said way by said decree, filed May 5, 1898.

At the trial in the Superior Court before *Bishop, J.*, it appeared that the case had been sent to Charles A. Williams, Esquire, of Brookline, as auditor, who reported the evidence, the material portions of which are stated in the opinion of the court, and found that the petitioners were not the owners of the fee in the part of Regent Street discontinued as a highway having conveyed it to the respondents by their deeds described in the opinion. The auditor's report continued as follows:

"I also ruled as matter of law that even if I had erred in my interpretation of the rule of law to be applied in the construction of said deeds, and in disregarding the findings of fact made by me upon the evidence introduced for the purpose of showing the construction put upon said deeds by the parties thereto, so that it should prove that the petitioners had not parted with the fee and soil of the part of Regent Street which was discontinued by the decree of the Superior Court, dated May 7, 1897, confirming the report of said Commissioners, and that the petitioners at the date of said decree did in fact own the fee of the part of said street so discontinued by said decree, the petitioners nevertheless were not upon the facts found by me entitled to recover any damages of the respondents.

"All of the foregoing rulings on matters of law were made by me in response to specific requests for rulings made by the respective parties.

"I, therefore, in accordance with said rulings, find and report

to the Court that the petitioners are not entitled to recover any damages of the respondents."

In the Superior Court the only evidence introduced was the auditor's report. The petitioners contended that upon the facts stated in the report the auditor should have found for them, and they also requested the judge to make the same ruling which the auditor was requested to make, that is, that the petitioners at the time of the taking were the owners, subject to the public right of way, of the part of Regent Street discontinued as a highway. The judge refused so to rule, and the petitioners excepted.

The petitioners also contended that the evidence as to the amount of their damages which the auditor excluded should have been admitted, and offered to introduce such evidence. The judge excluded it and the petitioners excepted.

The judge ordered a verdict for the respondents, to which the petitioners excepted, and by consent of both parties the judge reported the case for the consideration of this court. If the rulings were correct judgment was to be entered upon the verdict; otherwise, the case was to stand for trial or such other entry was to be made as law and justice might require.

The case was argued at the bar in November, 1900, and afterwards was submitted on briefs to all the justices.

C. F. Jenney, for the petitioners.

J. H. Benton, Jr., for the respondents.

BARKER, J. The principal question is whether the deeds of February 12, 1890, divested the grantors of title in the soil of those parts of Regent Street which did not abut upon the lots conveyed by the deeds to the respondents.

In Isaac Bullard's deed the only language relied upon to produce that effect is the clause "Also intending to convey to the grantee all my rights in said Regent Street above mentioned." This clause follows two separate descriptions of the premises which the deed purports to convey. The first description is of a certain parcel of land in Hyde Park comprising the greater portion of six lots whose numbers are stated, reference being made also to a plan. Then the deed states that the parcel "is bounded and described as follows." In the statement of bounds which follows is the first reference to Regent Street, and it is in these words: "Beginning at the southwesterly corner of the said

parcel where Regent Street meets the land of the Boston and Providence Railroad Company, thence running northerly by the easterly line of Regent Street four hundred eight and eight tenths (408.8) feet to a point, thence turning and running easterly" etc. In the rest of this clause there is no further mention of Regent Street.

The other deed of the same date is similarly drawn and the clause in it "Also intending to convey to the grantee all our rights in said Regent Street" should be given the same legal effect.

The street was over two thousand seven hundred feet in length. It had been opened as a means of developing land divided into many lots, of which but a few were conveyed to the grantee by the deeds in question, and the title to much the greater number remained in the grantors. The grantee was a railroad corporation having no conceivable use for the title of much the greater portion of Regent Street, while if the grantors absolutely divested themselves of all rights in the whole street, the value of their unsold lots would be injuriously affected. The lots conveyed to the grantee ran back from Regent Street to the railroad location, something over a hundred feet. In each deed the exact description of the granted premises carried them only to that line of the street which was nearest the location of the railroad. The rights stated as those which the grantors were "Also intending to convey to the grantee" were not stated in the clauses to be "all my rights in Regent Street" or "all our rights in Regent Street," but in the first deed "all my rights in said Regent Street above mentioned," and in the second "all our rights in said Regent Street." In form the clauses purport to express the intention of the preceding grants of lots, rather than to make a grant of an additional parcel of land. After the delivery of the deeds the grantee graded the land lying between the railroad location and the easterly line of Regent Street, and did not grade any part of the street, and erected a fence on the easterly line of the street.

Under these circumstances it seems to a majority of the court that the title to the soil in those parts of the street against which the lots granted did not abut remained in the grantors.

The use of the name of a street in such a connection does not

mean necessarily the street throughout its whole length. Streets are often miles in length, and it would be to give language a meaning contrary to its ordinary acceptation that such a mention of a street must mean the street in its whole length. Such a clause in a deed of land on Beacon Street near the State House ought not to be held to convey the grantor's interest in Beacon Street opposite another lot of his land located at the other extremity of the city. Therefore the words are open to construction in the light of the circumstances attending the making of the deeds. Under the circumstances the meaning which should be given to them is that they designate those parts of the street which in the deeds are said to bound the lots conveyed as the Regent Street in which it is the intention of the grantors to part with all their rights.

These circumstances fairly distinguish the case from that of *Holt v. Somerville*, 121 Mass. 574. That was not a case where lots fronting on a street were being conveyed, but of the conveyance, as part of an adjustment of land damages, of land so cut up by a taking for a park that it could not be used as lots.

The remaining question is whether, owning the fee of the land, the petitioners should have been allowed to introduce evidence tending to prove that they were damaged by the taking of the land for railroad purposes by the decree for the alteration of the grade crossing.

The land was a highway when the proceedings for the alteration began. In the course of the proceedings the highway was discontinued and the land taken by the railroad company for railroad purposes. If we should assume that the petitioners had no such right to damages as if the discontinuance of the highway and the taking for railroad purposes were not in effect one transaction, a question upon which we express no opinion at present, it cannot be said as matter of law that the devotion of the land to a new and different use from that to which it had been subjected by its taking for a highway may not have been more onerous upon the landowner than the former use. The petitioners contended that they were damaged and offered evidence in support of their contention, which was excluded under their exception. It should have been admitted, and the damages, if proved, awarded.

In accordance with the terms of the report the case must

Stand for trial.

ANN WEATHERBEE vs. NEW YORK LIFE INSURANCE
COMPANY.

Suffolk. January 7, 1901. — May 21, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER,
HAMMOND, & LORING, JJ.

A married woman took out an insurance policy on the life of her husband and, after paying premiums on it for several years, gave it to her husband for safe keeping. He without the consent or knowledge of his wife surrendered the policy, and took out in exchange a new policy payable to his legal representatives. This policy he assigned and the assignee paid the premiums on it until the death of the assured. The widow, then first learning of the new policy, sued on the original policy issued to her, contending that it was still in force and that the payments of premiums on the new policy were applicable to the old one. *Held*, that the first policy was forfeited for non-payment of premiums, the payments on the new policy having been made upon a contract to which the plaintiff was a stranger. Whether the plaintiff was entitled to recover the surrender value allowed by the terms of the policy, *quære*.

An act or representation in order to create an estoppel or constitute a waiver must have been known and relied upon by the person seeking to set it up.

CONTRACT upon a policy of insurance dated March 9, 1864, issued by the defendant upon the life of Freeman F. Weatherbee and payable to the plaintiff, his widow. Writ dated November 3, 1899.

In the Superior Court the case was heard on agreed facts and judgment ordered for the plaintiff for \$3,469.65, and the defendant appealed.

From the agreed facts the following appeared: On December 30, 1863, Ann Weatherbee, the plaintiff, and Freeman F. Weatherbee, her husband, applied to the defendant for a \$2,000 ten-payment life policy. This was issued January 14, 1864, on the life of Freeman F. Weatherbee, payable to the plaintiff or her legal representatives. On an application by the plaintiff and her husband for additional insurance to the amount of \$1,000, the defendant, combining the policy of January 14, 1864, and the application for additional insurance, issued a new policy for \$3,000, dated March 9, 1864. When the last described policy was issued, it was delivered to the plaintiff by the general agent of the defendant in Boston, and the first premium

on the policy was paid by her. The plaintiff retained possession of the policy until 1866 or 1867, when she delivered it to her husband for safe keeping. During the time the policy was in the plaintiff's possession, she paid all the premiums thereon from her own money. The premiums were paid and all the requirements of the policy fully performed up to December 30, 1870. The interest on a premium note due on January 4, 1871, was not paid when due, but was subsequently paid. In 1874 the premium notes were returned to Freeman F. Weatherbee at the time of the payment of the sum of \$54.10 to the company, when the policy by its terms became a paid up policy.

On January 4, 1871, the policy was returned by Freeman F. Weatherbee to the defendant, without the knowledge or consent of the plaintiff who was named as beneficiary therein, and Freeman F. Weatherbee requested in writing a change of interest to his own favor. At the request of Weatherbee, one Russell, the defendant's general agent, indorsed on the policy the following: "Payment of \$82.86 renewal premium." And Russell made indorsements on the margin of the policy returned to the defendant, to the effect that a new policy "in favor of self" had been issued. Without any new examination or application a new policy dated January 5, 1871, payable to Freeman F. Weatherbee's legal representatives sixty days after proof of his death, was issued by the defendant in place of the policy returned.

This last mentioned policy was assigned on January 9, 1871, by Freeman F. Weatherbee to one George W. Brown "as collateral security for any indebtedness from me to him at the time of my decease." The defendant, after this assignment, paid to Brown dividends which had accrued on the policy dated March 9, 1864, and the dividends which had accrued under the policy issued in 1871, treating the last policy as a continuation of the first. The payment of dividends to Brown was continued up to June 26, 1875, when Brown assigned the policy to one William W. Forbes, plaintiff in the case of *Forbes v. New York Ins. Co.*, ante, 139, after which date the dividends were paid by the defendant to Forbes. The assignment to Brown was made by Weatherbee to secure the payment of certain notes.

All the premiums on the policy last issued were duly paid to the defendant up to December 30, 1873, when by its terms the

policy issued March 9, 1864, was to become a paid up policy, and all the other conditions and requirements of the last policy to be kept or performed by Freeman F. Weatherbee or the plaintiff were duly kept and performed up to the time of Freeman F. Weatherbee's death on October 14, 1896. The plaintiff gave the defendant due and proper notice and proof of Weatherbee's death, and demanded payment of the amount of the policy from the defendant on July 11, 1897. The plaintiff did not know of the return of the policy dated March 9, 1864, to the defendant and the issuing of a new policy in its place, changing the designation of the beneficiary, until after Freeman F. Weatherbee's death.

Upon the foregoing facts the plaintiff contended that the policy issued March 9, 1864, continued in full force, and that the premiums paid on the policy issued January 5, 1871, were applicable to the policy issued March 9, 1864, and that she was entitled to recover the insurance money, with interest.

The case was argued at the bar in January, 1901, and afterwards was submitted on briefs to all the justices.

I. R. Clark, (*W. A. Morse* with him,) for the defendant.

J. E. Cotter, (*E. S. Fellows* with him,) for the plaintiff.

HOLMES, C. J. This is an action at law upon a policy of insurance issued to the plaintiff and subsequently surrendered by her husband without her knowledge, he taking a new policy payable to himself. The proceeding is not a bill in equity and is not brought for the purpose of enforcing a trust in the second contract. See *Nesbitt v. Berridge*, 10 Jur. (N. S.) 53; *Barry v. Brune*, 71 N. Y. 261; *Chapin v. Fellows*, 36 Conn. 132; *Lemon v. Phoenix Ins. Co.* 38 Conn. 294, 302; *Matlack v. Seventh National Bank*, 180 Penn. St. 360. It must be taken to assume the first to be in force and to refer to the second, to which the plaintiff is a stranger, simply for the purpose of seeking to have the payments of premiums under it treated as payments upon the first and as enuring to the benefit of the plaintiff. This cannot be done. No doubt the attempt to substitute a new contract for the old one was void, but the plaintiff cannot give the payments under it a new character by attempting to ratify or adopt them. She cannot affirm or adopt them except as they were made, and they were made upon a contract to which, as we have said, she was a stranger.

The plaintiff contends that at all events there has been no forfeiture of the policy because the defendant by assuming to end it exonerated the plaintiff from tendering the premiums under it. Language to that effect can be found in one case, at least. *Pilcher v. New York Ins. Co.* 33 La. An. 322, 326. See *Garner v. Germania Ins. Co.* 110 N. Y. 266. But there can be no estoppel or waiver by conduct of which the plaintiff was ignorant. We assume that she was within the scope of the defendant's act which was directed against the contract to which she was a party. But it cannot be assumed that if the plaintiff had tendered the premiums after the surrender as before, thereby indicating to the defendant that she did not assent to the attempted change, the defendant would not have accepted the money and have fulfilled its obligations. Presumably it was acting honestly in the matter, and believed that it had her assent. On the other hand if we suppose the plaintiff to have been informed of the substitution and to have remained silent for an appreciable time, she probably would have been estopped at a later date, when the value of the policy had changed, to set up her original rights. In short, she cannot take advantage of the defendant's conduct as a waiver without finding herself in the position of having waived her right to repudiate the result.

The question whether the plaintiff is entitled to judgment for the surrender value allowed by the terms of the policy when premiums have been paid for more than two years, was not argued, and we leave it for decision in the Superior Court.

Judgment reversed ; case to stand for further hearing.

COMMONWEALTH vs. CHARLES A. SISSON.

Plymouth. March 12, 1901. — May 21, 1901.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Delivering trading stamps with articles sold for cash in accordance with previous announcement, entitling the purchaser to select and receive one of a number of articles exhibited at the store of an independent corporation issuing the stamps, is not a violation of St. 1898, c. 576, as there is no gambling element in the transaction. That statute, as construed by the court, merely prohibits the use of trading stamps in transactions involving the element of chance.

COMPLAINT in the Police Court of the city of Brockton, charging the defendant with a violation of St. 1884, c. 277, as amended by St. 1898, c. 576, in selling goods with trading stamps as an additional inducement, filed September 27, 1900.

At the trial, before *Fox, J.*, in the Superior Court for the county of Plymouth, to which the case came by appeal, the defendant pleaded not guilty, and agreed that if the government witnesses were called they would testify in substance to the following facts:

The defendant, acting as a clerk in a drug store, on the day named in the complaint, sold to the person named in the complaint a certain hair brush, and at the same time, and as part of the same transaction, delivered to that person twenty-five stamps or coupons, which entitled the purchaser to demand of the National Discount Stamp Company any one of a number of articles on exhibition at the store of that company that the purchaser might select; that the National Discount Stamp Company is the business name of an association of individuals other than the proprietor of the store where the brush was sold and where the coupons or stamps were delivered to the person named in the complaint.

The defendant then offered to show the following facts as a defence, and the Commonwealth agreed that his witnesses would so testify, if the evidence was competent and constituted a defence, but denied that it did so, and objected to its introduction.

The evidence offered and agreed to was, that the merchant makes a contract with the stamp company to give out their stamps with every cash purchase of ten cents, or multiples of that sum. These stamps are given to the purchaser of goods from the merchant and are taken to the store of the stamp company, where they are exchanged for any one of a large number of articles that the purchaser may select. These articles are on exhibition all the time, and are of sound value, and the number of stamps necessary to obtain an article is indicated on the article. These articles consist mainly of furniture and household utensils. The value of the article given in exchange for stamps varies in accordance with the number of stamps offered for exchange. In the present case twenty-five stamps were offered in exchange, and a cup and saucer were given by

the stamp company for the twenty-five stamps. The specific subject of the sale was the hair brush, and the stamps were delivered as a bonus. The merchants who give stamps for cash trade, display signs in their windows to that effect. Every purchaser knows what he is buying, and can select at the store of the stamp company, even before his purchase from the merchant who gives stamps, the article that he wants in exchange for the stamps which are given with the article purchased.

On the above facts the defendant requested the judge to rule that the defendant could not be convicted, on the ground that St. 1898, c. 576, was unconstitutional. The judge refused so to rule, and instructed the jury that the act was constitutional, and that the evidence for the Commonwealth, as agreed to by the defendant, would, if believed, be sufficient to justify a verdict of guilty. To the refusal to rule as requested, and to the ruling given, the defendant excepted.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

St. 1898, c. 576, is entitled "An Act relative to trading stamps, coupons and other devices," and reads as follows:

"The provisions of chapter two hundred and seventy-seven of the acts of the year eighteen hundred and eighty-four shall apply to the giving of any stamp, coupon or other device which entitles a purchaser to demand or receive from any person or company other than the merchant dealing in the goods purchased or the manufacturer thereof, any other property than that actually sold or exchanged; and also to the delivery by any person or company other than the merchant dealing in the goods purchased or the manufacturer thereof, of any goods, wares or merchandise upon the presentation of such stamp, coupon or other device."

Chapter 277 of the acts of the year 1884, referred to in the statute above quoted, is entitled "An Act to prevent the sale or exchange of property under the inducement that a gift or prize is to be part of the transaction," and reads as follows:

"Section 1. No person shall sell, exchange or dispose of any property, or offer or attempt to do so upon any representation, advertisement, notice or inducement that anything other than what is specifically stated to be the subject of the sale or exchange, is,

or is to be delivered or received, or in any way connected with, or a part of the transaction." The only other section of the statute provides a fine of not less than \$10 nor more than \$500 for a violation of the above provision.

F. W. Tillinghast, J. S. Murdock & R. W. Nutter, for the defendant.

J. M. Hallowell, Assistant Attorney General, & *R. O. Harris*, District Attorney, for the Commonwealth.

HOLMES, C. J. This court had construed St. 1884, c. 277, and its decision had been public for two years when St. 1898, c. 576, was passed. *Commonwealth v. Emerson*, 165 Mass. 146. It must be presumed that the Legislature knew the construction of the earlier act and adopted it when it passed the later one. The former act punished selling property upon the inducement that something other than what is specifically stated to be the subject of the sale is to be delivered. This was construed in *Commonwealth v. Emerson* to refer only to the offer of bargains that appeal to the gambling instinct and induce people to buy what they do not want by the gift or promise of a prize, the nature of which is not known at the moment of making the purchase. When then it is enacted by the later statute that the provisions of the one last mentioned shall apply to the giving of a stamp or coupon entitling the purchaser to other property from other persons, the same limitation to the generality of the words used must be understood.

The act of 1898 cannot be taken to prohibit a rebate on the nominal price of goods, or the giving of this rebate in the form of another symbol of purchasing power instead of money, as for instance a draft upon another merchant, payable in goods. It prohibits the giving of coupons only to the same extent that the act of 1884 prohibits the giving of goods. Those who framed the act very probably had in mind the accomplishment of more than we take the act to effect, and of results which have been held unconstitutional elsewhere. *People v. Gillson*, 109 N. Y. 389. *Long v. State*, 74 Md. 565. *Ex parte McKenna*, 126 Cal. 429. *State v. Dalton*, 22 R. I. 77. See *Chicago v. Netcher*, 183 Ill. 104. But on the other hand it is no less probable that some at least of those who concurred in passing the statute saw that its effect necessarily would be cut down by the construction

already given to the act upon which it was engrafted. The fact that it is thus limited makes it unnecessary to consider the above decisions or to compare them with *Lansburgh v. District of Columbia*, 11 App. D. C. 512.

So far as appears there was no gambling element in the defendant's transaction, and his acts were not prohibited by law.

Exceptions sustained.

P. P. EMORY MANUFACTURING COMPANY vs. S. SALOMON
& another.

Hampshire. April 3, 1901. — May 21, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

In an action of contract for a failure to sell and deliver certain goods, it appeared, that the defendant had agreed to ship the goods on February 1, and on January 25 wrote to the plaintiff that he would not keep his contract. The plaintiff replied that he should hold him to his bargain, and on February 2 made a further demand for performance which was refused. *Held*, that there was no breach of the contract until February 1, and that the measure of damages was the difference between the contract price and the market price on that day and not between the contract price and the price on January 25 when the defendant announced his intention of breaking the contract.

CONTRACT by a corporation to recover damages sustained by reason of the failure of the defendants, copartners doing business under the name of Columbia Smelting and Refining Works, to deliver certain metals which the defendants had agreed to sell and deliver to the plaintiff at prices named. Writ dated October 6, 1899.

At the trial in the Superior Court, before *Stevens, J.*, without a jury, the facts were proved as stated in the opinion of the court, and the only question raised by the exceptions related to the measure of damages.

The contract required the defendants to deliver the goods on February 1, 1899. On January 25, 1899, the defendants wrote to the plaintiff that they would not carry out the order of the plaintiff accepted by their agent the day before, as metals had advanced in value. It appeared that the market price of the metals contracted for was greater on February 1, the day fixed

for performance, than on January 25, when the defendants wrote their letter above mentioned, both prices being above that named in the contract.

The plaintiff requested the judge to rule, that the measure of the damages which the plaintiff was entitled to recover was the difference between the price expressed in the memorandum of sale and the market price on February 1, 1899, the date therein fixed for delivery. The judge refused so to rule, but ruled that the measure of damages was the difference between the price expressed in the memorandum and the price quoted in the letter from the defendants to the plaintiff under date of January 25, 1899. To this ruling and refusal to rule the plaintiff excepted.

The judge found for the plaintiff in the sum of \$175.03; and the plaintiff alleged exceptions.

R. A. Knight & E. H. Brewster, for the plaintiff.

H. K. Hawes, for the defendants.

HOLMES, C. J. This is an action of contract for a failure to sell and deliver certain metals as agreed. The contract was to ship on February 1, 1899. On January 25 the defendants wrote to the plaintiff that they would not keep their contract. The plaintiff replied that it should hold them to their bargain, and on February 2 made a further demand of performance. At the trial the contract and breach having been proved, the plaintiff asked the judge to rule that the measure of damages was the difference between the contract price and the market price on February 1. The judge refused the request, and ruled that the date to be taken was that of the defendants' letter, January 25. The plaintiff excepted.

The ruling requested should have been given. Even in England where perhaps the courts would go further than we do in the way of allowing an anticipatory notice that the defendant will not perform his contract to be treated by the plaintiff as a breach, it seems to be settled that "the promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance." *Frost v. Knight*, L. R. 7 Ex. 111, 112. *Johnstone v. Milling*, 16 Q. B. D. 460, 470, 473. *Roehm v. Horst*, 178 U. S. 1, 19. *A fortiori* the same is true when, as in this case, the promisee,

had he wished to do so, would not have been allowed to treat the notice as a breach. *Daniels v. Newton*, 114 Mass. 530. *O'Brien v. Boland*, 166 Mass. 481, 484. A notice which gives the promisee no right to damages cannot bind him as conclusive that the contract will not be performed, and so put upon him a responsibility to see that the damages are no greater than they need be. It is a mere prophecy, and as such may be disregarded. Until the moment when a refusal to perform is a wrong, he has a right to expect that when the time comes a wrong will not be done. Sedgw. Damages, (8th ed.) § 224. The case has nothing in common with that of a refusal after the time of performance has arrived. *Kadish v. Young*, 108 Ill. 170, 185. *Davis v. Bronson*, 2 No. Dak. 300, 303. See *Martin v. Meles*, Suffolk, May 23, 1901. See further, for the rule of damages which we adopt, *Leigh v. Paterson*, 2 Moore, 588; *Phillpotts v. Evans*, 5 M. & W. 475; *Kadish v. Young*, 108 Ill. 170, 178; Sedgw. Damages, (8th ed.) § 758.

Exceptions sustained.

CHARLES N. WHITAKER vs. ALBERT F. BALLARD.

Hampden. May 6, 1901. — May 21, 1901.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

A presiding judge is justified in refusing to give an instruction requested, if it assumes the existence of a fact which the jury might or might not find to be proved.

In maintaining a defence of payment to a suit by a collector of taxes for a tax, it was shown that the defendant paid the amount of the tax to the town treasurer who until recently had been authorized by the collector to receive such payments. *Held*, that the burden of proof was on the defendant to show that the authority remained unrevoked at the time of the payment, or that he paid in good faith relying on the previous existence of the authority and believing that it remained unrevoked, although, had there been no evidence of revocation, the defendant, to meet the requirement of proof on his part, could have relied on a presumption that the conditions remained unchanged.

In a suit by a collector of taxes for a tax, the defence relied upon was that the defendant paid the tax to the town treasurer who until recently had been authorized by the collector to receive such payments. The plaintiff was permitted to put in evidence the record of a former suit by the plaintiff against the defendant brought before the defendant made the payment to the treasurer, with evidence that the defendant knew that he could get that suit dismissed for

insufficient service. *Held*, that the record of the former suit was competent in connection with other testimony, on the question whether the defendant paid in good faith believing that the treasurer was authorized to receive payment of the tax for the collector.

CONTRACT to recover the amount of the defendant's tax in the town of Hampden for the year 1896. Writ in the Police Court of the city of Springfield, dated April 24, 1897.

The answer contained a general denial and a plea of payment.

At the trial on appeal in the Superior Court, before *Maynard, J.*, it appeared, that the plaintiff was tax collector of the town of Hampden for the years 1895, 1896 and 1897; that during the years 1895 and 1896, and a portion of 1897, some of the taxpayers of that town had, as a matter of convenience to themselves, paid their taxes directly to John Q. Adams, the treasurer of the town; that such payments were so made with the sanction of the plaintiff, and that the defendant's tax for 1895 was so paid; that Adams receipted the bills so paid as previously made out and sent to the taxpayers by the plaintiff by signing the plaintiff's name as collector, "By J. Q. Adams, Treas.," on the face of the bill, and that the money so paid was credited to the plaintiff in settlements thereafter made by him with Adams. It further appeared in evidence, that on April 8, 1897, the plaintiff brought a suit against the defendant for the same cause of action as here, which was entered in the same Police Court, but on the day the present suit was brought the former suit was, on the defendant's motion, dismissed for insufficient service; and that while the first suit was pending the tax for 1896 was paid by the defendant to Adams.

The plaintiff testified that before bringing suit he asked the defendant several times to pay the tax declared on; that on the fifth day of the April in which both suits were brought, he told the defendant he would like his tax money, and the defendant replied, "Get it if you can," to which the plaintiff said, "I can get it, and you will come pretty near paying it to me"; that on the same day the plaintiff called on Adams and notified him not to receive any more money from the defendant for taxes, and not to receipt in the plaintiff's name on any bill, as he was going to collect Ballard's tax, and that Adams replied, "All right."

On cross-examination, the plaintiff further testified that on the evening of April 12, and before the commencement of the present suit, Adams informed him that the defendant had paid him some money, and that afterwards he inquired of Adams what kind of a receipt he had given the defendant; that Adams informed him, and that the plaintiff took a copy of the receipt which he had given the defendant.

The plaintiff was permitted to introduce, against the defendant's objections and exception, records of the Police Court, showing that a suit was brought by the plaintiff against the defendant in that court by writ dated April 8, 1897, and returnable on the seventeenth day of the same month, to recover the same tax, and that, upon the defendant's motion, that action was dismissed on the twenty-fourth day of April on the ground of insufficient service, this evidence being introduced and admitted for no other purpose than as bearing upon the defendant's knowledge that, at the time the tax was paid by him, the authority of Adams to receipt bills had been revoked, and that he had no authority to receive taxes, and the jury was fully instructed that the record so offered had no other purpose and was not to be otherwise considered.

Adams was called by the defendant, and testified in substance that on the occasion of his first interview with the plaintiff, above referred to, the plaintiff did not instruct him not to receive any more taxes, but instructed him not to sign the plaintiff's name to any more tax bills; that Adams replied that he did not see how he could refuse to receive any more money, and that thereupon the plaintiff repeated the instructions not to sign his, the plaintiff's, name to any more tax bills.

On cross-examination, Adams testified that on the twelfth day of April the defendant came to him to pay his tax; that he informed the defendant that the plaintiff had instructed him not to receipt any more tax bills in his name; that the defendant then inquired if he could not take the money and give him a receipt in his own name, and Adams replied, "I don't know of any objection to that," and that he took the money and made out a receipt. Adams further testified that within a few hours after the defendant had paid him his tax he informed the plaintiff of the payment, and the plaintiff took a

copy of the receipt which Adams had given to the defendant; that at the time the tax was paid he was not informed by the defendant, and had not been informed, that a suit was pending for the recovery of the tax; that had he known of the pendency of such suit he should not have received it; that the plaintiff refused to accept the money paid by the defendant. The wife of Adams and the defendant himself described the payment to Adams in substantially the same manner.

On cross-examination, the defendant testified that he said nothing to Adams regarding the suit then pending for the recovery of the tax, and that he knew there was some ground upon which he could get the then pending suit dismissed.

At the close of the evidence, the defendant requested the judge to instruct the jury that Adams's authority to receive payment having been established; the burden was upon the plaintiff to prove that the authority had been revoked, and that knowledge of its revocation had been brought home to the defendant prior to the payment on the twelfth day of April.

The judge, so far as material to the exceptions, instructed the jury as follows :

“ This is a suit brought by the tax collector of the town of Hampden against a person who was assessed taxes which the collector says have not been paid. It was lawful for Mr. Whitaker to appoint Mr. Adams his agent, to receive the money, and if he did appoint him his agent, and while that agency lasted, anybody who paid the money to that agent under the authority of Mr. Whitaker, would make a good payment, but after the authority was revoked it would not be a good payment unless it had not come to the knowledge of the party paying, or there were such circumstances surrounding it that the party would be led to suppose that the authority had been revoked. There is no question but what Mr. Adams had authority from this collector to receive and receipt for taxes up to the 5th of April, and there is where the divergence comes. The plaintiff says that on the fifth day of April he told this treasurer that he must not take any more money for the taxes of this defendant. There has been introduced in this case the record of a former suit. That is, this tax collector, before this money was paid, brought a suit against Ballard, but upon the inspection of the

record it appears that the papers were served by a constable, and the constable had no authority to serve such papers, and when it came into court the defendant made a motion to have the suit dismissed, and the suit was dismissed, and upon the day it was dismissed the plaintiff started a new suit in place of it, which is the suit being tried. That affects nothing except as you may think it may have some bearing upon the question whether or not Ballard understood from that that Adams had no longer any authority to collect the taxes. That is one of the considerations which you have a right to take into account as bearing upon Ballard's knowledge whether or not Adams had any further right to take the taxes in place of Whitaker, whether or not he was not put upon his guard. Passing that, was Adams's authority to take the money revoked? Of course, if Adams's authority was not revoked, if Adams, when this money was paid, still had authority to receive it, and the authority had not been revoked by Whitaker, then it was a good payment of the taxes, and this suit cannot be maintained. It is agreed that up to the fifth day of April Adams had authority to receive taxes on Whitaker's account and give a receipt for them. If that authority never was revoked up to the time the money was paid, it would be a good payment. But the plaintiff contends that that authority was revoked. If you find that authority never was revoked, you need not proceed to consider the matter any further, because that would be a good payment and the defendant would not be liable. If you find that it was revoked, then the only remaining question is when Ballard turned that money over to Adams, did he turn it over in payment of his tax, and did he do it in good faith, with the understanding and belief that the authority of Adams to receive it still existed? As bearing upon that point, you will consider what had taken place between the parties, that is, the suit which had been brought before. That does not necessarily decide it, but you have a right to take it into account, the conversation which had taken place between Ballard and this tax collector, the tax collector testifying that he had told Ballard previously that he would have to pay the money to him, and Ballard's statement that Whitaker did not so inform him, and Adams's statement that he told Ballard he could not give a receipt. What had Ballard a right to understand from that?

"Taking all those things that took place between the parties, when Ballard went there to pay that money, did he, acting reasonably, honestly, understand and believe that the authority of Mr. Adams still existed to take that money? If, taking all those matters into consideration, you find that Ballard, acting reasonably, as a man of reason, honestly believed that Adams had the right to take that money in settlement, then he is entitled to a verdict, but if, on the other hand, you find that the authority was revoked, and that when he came with the money, acting as a man reasonably ought to act, he had reason to suppose that that authority had been revoked, then it would not be a good payment and Ballard would be liable for the amount of this tax, and interest from the date of the writ. In the first place, was the authority of Adams to receive the money revoked? If it was not revoked, then it was a good payment. If it was revoked, then the burden is upon the plaintiff to show this by a fair preponderance of the evidence. Does the evidence satisfy you that Ballard paid that money in good faith, having reason to believe that the authority of Adams to take that money still existed? If he did, it is a good defence. If not, the defence cannot prevail."

The defendant again requested the judge to instruct the jury, that Adams's authority to receive payment having been established, the burden was on the plaintiff to prove that the authority had been revoked, and that knowledge of its revocation had been brought home to the defendant prior to the payment on the twelfth day of April, 1897. Except as above, the judge refused so to instruct the jury. To the refusal to rule as requested and to the admission of the record of the former suit, the defendant excepted.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

D. E. Webster, for the defendant.

C. L. Gardner & C. G. Gardner, for the plaintiff.

KNOWLTON, J. The principal questions in this case arise on the defendant's answer of payment. Inasmuch as there was no contention that payment was made to the plaintiff personally, the burden of proof was on the defendant to show that the person to whom he made the payment was an agent of the plaintiff, duly authorized to receive it for him.

The defendant requested the court to instruct the jury that "Adams's authority to receive payment having been established, the burden was upon the plaintiff to prove that the authority had been revoked, and that knowledge of its revocation had been brought home to the defendant prior to the payment." So far as appears from the evidence stated in the bill of exceptions, the judge was not bound to assume that Adams's authority to receive payment of this particular tax was established. The evidence was of a general character which would well warrant a finding that at one time he had authority to receive such payments; but such a finding would be only a matter of inference and not of uncontrovertible proof as to this particular tax. So far as appears it was a sufficient reason for refusing to give the instruction requested that it assumed the existence of a fact which the jury might or might not find to be proved. But if it had been proved, the burden of proof was on the defendant to show that the authority remained unrevoked at the time of the payment, or that he paid in good faith, relying on the previous existence of the authority, and believing that it remained unrevoked. In the absence of evidence of revocation he might have relied on a presumption that the conditions remain unchanged, and as a matter of proper inference a verdict might have been returned in his favor. But such a verdict would have been rendered, not because the burden of proof was on the plaintiff, but because in the absence of further evidence, proof of the antecedent fact met the requirement of proof by the defendant. The instruction given, that the burden was on the plaintiff to prove a revocation of the authority, was therefore, too favorable to the defendant.

The uncontradicted evidence shows that the authority, if it ever included this tax, had been revoked. The defendant's own admission that he knew that a suit had been brought against him by the plaintiff for the tax before he paid it, and that he knew there was a ground on which he could get that suit dismissed, and that Adams told him he could not sign the plaintiff's name to a receipt for payment, as he formerly had been accustomed to do, coupled with Adams's testimony that he told the defendant that the plaintiff had instructed him not to receipt any more tax bills in his name, shows that the defendant knew

that it had been revoked. After the revocation of such authority, if the defendant made a payment, it is too plain for discussion that the burden of proof would be on him to show that he paid in good faith, relying on the former authority and in ignorance of the revocation.

The evidence of the former suit against the defendant to recover this tax, with the defendant's knowledge of a reason for dismissing it, was competent, in connection with the other testimony, on the question whether the defendant paid in good faith, believing that Adams was authorized to receive payment for the plaintiff.

Exceptions overruled.

SAMUEL M. STOCKER vs. WILLIAM A. FOSTER & another.

Essex. November 7, 1900. — May 22, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER,
HAMMOND, & LORING, JJ.

The will of a married woman contained the following devise: "All my estate both real and personal, of which I may die seized and possessed, or to which I may be entitled at my decease, I give, devise and bequeath to my husband A. B., to have and hold the same to him for and during his natural life; with full power and authority to sell and dispose of any and every portion thereof, whenever in his judgment he may deem it conducive to his comfort." Then followed the provision "At the decease of my said husband, all the residue of my said estate, that shall not be sold or disposed of by my said husband during his lifetime, I give, devise and bequeath as follows:" The property was then left to two sisters of the testatrix during their joint lives and, on the death of the survivor, in fee to a person named. *Held*, that the husband took an estate for life with a power to sell and dispose of any part of it during his lifetime when he deemed such disposition conducive to his comfort, that the words "sell and dispose" meant a disposition by sale and not by gift, and that the "comfort" referred to was the personal if not wholly physical comfort of the husband himself and not such comfort as he might feel in giving the property to others, that the power was confined to sales for a valuable consideration to be made only when the husband in good faith deemed such consideration conducive to his comfort by supplying his present or prospective needs, and that a conveyance by him, purporting to be made in execution of the power, for a fictitious consideration to the mother of his second wife, her only child, in order that his children by his second wife might inherit the property, was not a valid execution of the power.

On the trial of a writ of entry, it appeared, that the tenant claimed under a deed purporting to be made by A. B., in execution of a power under a will, and that the will left the property in question to A. B. for life with a power of disposing

of it during his lifetime for certain purposes, and gave the remainder after intervening life estates to the demandant. *Held*, that the burden was upon the tenant to show a valid exercise of the power, because the remainder vested in the demandant upon the death of the testator and remained thus vested unless divested by a valid execution of the power.

The will of a married woman gave all her property to her husband for life, with a power of selling and disposing of it during his lifetime "whenever in his judgment he may deem it conducive to his comfort." Upon the issue whether a deed to the mother of the husband's second wife purporting to be made in execution of this power was given for a valuable consideration and whether the grantor in good faith deemed the proceeds conducive to his comfort, it was *held*, that evidence of the pecuniary condition and circumstances of the grantor at the time he gave the deed were material, and that it might be shown that he had retired from business and had a competency and was a man of means with a substantial property.

St. 1898, c. 535, provides, that "No declaration of a deceased person shall be excluded as evidence on the ground of its being hearsay if it appears to the satisfaction of the judge to have been made in good faith before the beginning of the suit and upon the personal knowledge of the declarant." *Held*, that under this statute a statement of a deceased grantor in disparagement of his grant, made in the absence of the grantee, may be admitted against the grantee, although it would not have been admissible if the grantor had been alive at the time of the trial. The statement in this case was material to show the intent with which the grantor executed the deed, and if alive he could have testified as to his intent.

St. 1898, c. 535, in regard to the admission as evidence of declarations of deceased persons formerly excluded as hearsay, is applicable to civil cases in which the cause of action accrued before its passage.

WRIT OF ENTRY brought by a devisee under the will of Mary Foster to recover a parcel of land in Beverly from the heirs at law of Martha P. Trow claiming under a deed from William A. Foster, husband of said Mary, purporting to be made in execution of a power given him by her will, dated March 27, 1899.

At the trial in the Superior Court, before *Pierce, J.*, without a jury, the following facts appeared :

The demandant was the Samuel M. Stocker mentioned in the fourth article of the will of Mary Foster. The tenants were in possession of the demanded premises claiming title by inheritance from Martha P. Trow.

The will of Mary Foster was dated December, 1869, and omitting the introductory paragraph and the attesting clause, was as follows :

"First. I constitute and appoint my said husband, William A. Foster, sole executor of this my last will.

"Second. All my estate both real and personal, of which I

may die seized and possessed, or to which I may be entitled at my decease, I give, devise and bequeath to my husband William A. Foster, to have and hold the same to him for and during his natural life; with full power and authority to sell and dispose of any and every portion thereof, whenever in his judgment he may deem it conducive to his comfort.

"Third. At the decease of my said husband, all the residue of my said estate, that shall not be sold or disposed of by my said husband during his lifetime, I give, devise and bequeath as follows: To my sisters Susan Fiske and Martha Raymond, all my silver spoons. To my nieces Hattie and Nancy Stocker, my watch, rings, jewelry and silver tea service, to be divided equally between them, and to my said sisters Susan Fiske and Martha Raymond, and to the survivor of them I give, devise and bequeath, the use, improvement and income of all of said residue of my estate, that shall be remaining at the decease of my said husband and which I have not hereinbefore in this clause of my will specifically disposed of, to have and to enjoy the same during their natural lives and the life of the survivor of them.

"Fourth. After the decease of my said sisters I give, devise and bequeath all my estate, that shall not have been sold or disposed of by my said husband, during his life, and which shall be remaining at his decease (except so much thereof, as I have disposed of in the third clause of this will) to Samuel M. Stocker, son of John M. Stocker of Lynn, to have and hold the same to him and his heirs and assigns forever."

Mary Foster died February 7, 1871, and her will was duly admitted to probate in the county of Essex, on the seventh day of March, 1871. At the time of her decease, she owned the demanded premises, which she inherited from her father. She died without issue, and her husband, William A. Foster, and her sisters, Martha Raymond and Susan Fiske, mentioned in the will, survived her. Martha Raymond died September 7, 1879, and Susan Fiske died April 4, 1887.

William A. Foster married a second time on November 18, 1872, and died July 24, 1898. The tenants are the only children of William A. Foster by his second wife. The second wife was the daughter and only child of Martha P. Trow, and died April 29, 1897. The tenant, William A. Foster, was born

December 12, 1873, and the tenant, Arthur T. Foster, May 12, 1879. Martha P. Trow died, intestate, April 29, 1898.

The deed from William A. Foster to Martha P. Trow was dated January 1, 1876, and began as follows:

“ Know all men by these presents That I, William A. Foster of Beverly, Essex County, Massachusetts, by authority of and under the will of my former wife, Mary Foster, as in my judgment it will now be conducive to my comfort to make this conveyance and to sell and dispose of the estate hereinafter described and in consideration of four thousand five hundred dollars to me paid by Martha P. Trow of said town of Beverly the receipt whereof is hereby acknowledged do hereby give, grant, bargain, sell and convey unto the said Martha P. Trow and her heirs and assigns forever, all that estate in said Beverly described in the deed of Susan Raymond and Martha Raymond to their sister, my said former wife, by deed . . . hereby conveying and intending to convey all the lands described in said several deeds including all that my said former wife inherited as well as what was conveyed in the deed of her said sisters, my said former wife having devised all her estate to me with full power and authority to sell and dispose of any and every portion thereof whenever in my judgment I may deem it conducive to my comfort. I do now make this conveyance under that authority, it being my judgment that it will conduce to my comfort so to do, and on account of the money consideration aforesaid.”

The remaining portion of the deed contained a conveyance of a lot owned by the grantor in his own right and continued in the ordinary form of a warranty deed.

The tenants introduced in evidence a promissory note of Martha P. Trow for \$4,500 dated January 1, 1876, and payable to the order of William A. Foster. They also introduced in evidence an instrument in writing purporting to be a lease of the demanded premises signed by Martha P. Trow and reading as follows: “ I hereby lease and let to William A. Foster of Beverly all the estate this day conveyed to me by him for the term of six years from this date, he yielding and paying therefor an annual rent of Three hundred and fifty dollars at the end of each and every year, he also paying the taxes on said property,

and to have the right of renewal of this lease on the same terms as above and for the same term of time after the first six years have elapsed. Witness my hand and seal hereunto this first day of January in the year eighteen hundred and seventy-six."

William A. Foster, one of the tenants, testified that he was the son of the William A. Foster named in the will, and the grandson of Martha P. Trow; that he found the note for \$4,500 among his father's effects; that the lease was either with his father's or his mother's effects where they kept them together in a certain drawer. On cross-examination he testified that he believed that he found the lease and note together in the same drawer; that there were other papers in the drawer with them; that the deed was not with them; that he and his brother together found the deed; that it happened some time ago; that he could not say just exactly where they found it; that the deed was found among his grandmother's effects; that his grandmother, his father, his mother, and his father's children, always formed one family, living together in the same house harmoniously; that they did not live on the farm which is in controversy in this case, which was carried on by a man named Taylor, and had been so carried on ever since he could remember; that his father retired from business with a competency and had not been in any business except carrying on this farm since he could remember.

George W. Taylor, a witness for the demandant, testified that he occupied the farm in controversy in this case, and lived there until the February after Foster died; that before 1876 he carried on the farm for Foster, and received some compensation from him for doing so; that he received the same compensation after 1876; that before and after 1876, Foster gave directions in regard to the way and manner of carrying on the farm; that there was not any time when any person other than Foster gave him directions in regard to the farm.

Taylor was permitted by the judge in the exercise of his discretion under St. 1898, c. 535, to testify against the objection and subject to the exception of the tenants to a conversation which he had with Foster, several years before Foster's death.

This conversation took place in the barn on the farm, and was as follows: "Q. What did he say to you about it? A. Well,

he said, 'Now,' says he, 'Now, I have got my property fixed' or 'my farm fixed so that my boys shall have it — my children shall have it.' Them is the words said to me — the remarks. I laughed at him and told him I thought it was all right before, and then he says — *Pierce, J.* Did he say children or boys? *A.* He said children."

"*Q.* You have stated that talk as nearly as you now recollect and as fully as you now recollect it? *A.* Yes. — *Q.* Now, to refresh your recollection, did he tell you at that time in any form of words that he had deeded it to the old woman Trow because the children would not get it otherwise? *A.* I think he did."

To the ruling of the judge admitting this testimony, the tenants excepted.

The judge ruled that it was competent for the demandant to prove the pecuniary condition and circumstances of William A. Foster on the date of the deed to Mrs. Trow; and to this ruling the tenants excepted. Without waiving their exception to the ruling admitting such proof the tenants admitted that William A. Foster retired from business before the death of his first wife, and that at the time of her death and ever since he had a competency and was a man of means; that at the time of his decease he had personal estate of the value of \$25,000 to \$30,000 and owned several parcels of real estate in Beverly. The value of this real estate did not appear in evidence.

Robert W. Osgood, a witness for the demandant, testified that he was employed in the registry of deeds for the southern district of the county of Essex; that he had a book containing entries showing the dates that deeds are left for record, and testified to the following entry: "August 16, 1888, docket number 18, time 2.35, a deed from William A. Foster to Martha P. Trow, land in Beverly, deed delivered to William A. Foster." This entry was admitted in evidence against the objection and subject to the exception of the tenants.

At the request of the demandant the judge ruled as follows: 1. The burden is on the tenants to prove a valid execution of the power. 2. On the evidence in this case it is competent for the court to find that there was not a valid execution of the power. 3. If William Foster conveyed the land in question for

the sole purpose of making a gift of it to Mrs. Trow in order to have it enure to the benefit of his second wife and their children, and without receiving or intending to receive any valuable consideration for it, then such conveyance was not a valid execution of the power. 4. The power in the will authorized Foster to sell or otherwise dispose of the property for a valuable consideration whenever in his judgment he deemed the proceeds of such sale or disposition conducive to his comfort. The word "dispose" in the clause "to sell and dispose" falls within the rule *noscitur a sociis*, and the power is not executed by a gift made in the form of a sale. 5. If the deed was given without receiving or intending to receive a valuable consideration for it, it was not an execution of the power. 6. If the only consideration for the deed was a note which William Foster did not intend to collect and which he took only for the purpose of giving to the transaction, which he intended to be a gift, the form and appearance of a sale and conveyance for a valuable consideration, then such sale and conveyance was not an execution of the power. 7. The deed in question was not an execution of the power unless, in the judgment of Foster, giving the deed was conducive to his comfort by enabling him to supply his present or prospective needs by means of the consideration received for the deed. 8. If the word "comfort" refers to mental condition in the will, then the authority in question authorized Foster to sell or dispose of the property only for a valuable consideration and when he deemed such consideration would be conducive to his happiness and peace of mind by furnishing him with the means of supplying his present or future needs. To each of these rulings the tenants excepted.

The judge refused to give certain rulings requested by the demandant which the finding of the judge has made immaterial.

The tenants asked the judge to rule that the power given by the will was, in effect, an absolute and unlimited power to sell and dispose of the property in question at the discretion of the devisee of the power, and whenever he deemed it conducive to his comfort so to do; that it was not competent for the court to pass upon the question whether the exercise of the power by the devisee was founded upon a reasonable judgment, or was exercised with due regard to the rights or interests of the demand-

ant; and that upon the evidence the action could not be maintained. The judge refused so to rule, and the tenants excepted.

The judge found that the transaction between William A. Foster and Martha P. Trow was a colorable transaction made without consideration, and carried out for the purpose of transferring the property in question so that it might descend to his children regardless of the will, and found for the demandant. The tenants asked the judge to rule that such a finding was not warranted by the evidence. The judge refused so to rule.

Upon the various matters stated above the tenants alleged exceptions.

The case was argued at the bar in November, 1900, and afterwards was submitted on briefs to all the justices.

J. J. Flaherty, for the tenants.

B. B. Jones, (*H. F. Hurlburt* with him,) for the demandant.

HAMMOND, J. The devise in the second clause of the will of Mary Foster did not give to William A. Foster, her husband, an estate in fee, but an estate for life coupled with a power to "sell and dispose of" any part of the estate during his lifetime "when- ever in his judgment he may deem it conducive to his comfort." *Kent v. Morrison*, 153 Mass. 137. *Collins v. Wickwire*, 162 Mass. 143.

We have first to deal with the question as to the nature of the power. It is contended by the demandant, on the one hand, that the power authorized Foster to sell, or otherwise dispose of, the estate only for a valuable consideration, and only when he deemed such sale or disposal to be conducive to his comfort by enabling him by means of such a consideration to supply his present or prospective needs. The tenants, on the other hand, contend that the power authorized Foster to sell and dispose of the property whenever such sale or disposition would have a tendency to promote his happiness or peace of mind, with or without regard to his present or prospective needs, and with or without a valuable consideration.

The testatrix left no issue, and, since the will, executed but a few months before her death, makes no mention of issue, we conclude that there were none at that time. While making her will, she had in her mind her husband, her sisters Susan and Martha, her nieces Hattie and Nancy, and the demandant, as

the persons among whom her property should be distributed. She begins with the husband, giving him a life estate coupled with a power to dispose of the real estate during his lifetime. She then gives a life estate in the real estate, after the death of the husband, to her two sisters, and the survivor of them, with remainder in fee to the demandant. All these estates, including that devised to the husband, may be abridged or defeated by the execution of the power given to him to dispose of the land. He is empowered to sell and dispose of the whole, or any part of the real estate, "whenever in his judgment he may deem it conducive to his comfort." The testatrix is speaking of property, and of property which she does not feel inclined to give in fee to her husband. It is her wish that, unless the sale and disposition of it shall in his judgment conduce to his comfort, it shall go to the other proposed objects of her bounty. She is speaking of that kind of comfort which arises from the sale and disposition of real estate. She is not speaking of heirlooms, nor does it appear that the real estate had any associations connected with it which would make its sale or disposition anything more than a mere matter of trade and the amount which could be obtained for it. The idea of sale, and of the disposition consequent thereupon, is the predominant idea in the mind of the testatrix. Under these circumstances we can have no doubt that by the words "sell and dispose of" is meant a disposition by sale and not by gift, and that the "comfort" to which such a sale would "conduce" is the physical comfort to be derived from the actual or potential application of the proceeds of such a disposition to the present or prospective physical comfort or support of the husband. There may be, also, to a limited extent, a mental element in the comfort, consisting of that peace of mind which comes from a knowledge or belief that, by reason of a change in the property resulting from a disposition by sale, it will be rendered more easily available for the physical comfort or support of the husband. See *Forman v. Whitney*, 2 Keyes, (N. Y.) 165.

But, all along, the language used by the testatrix seems clearly to refer to such comfort as can be attained by the application of the proceeds of the property to the reasonable needs of the life of the donee of the power, and not to that peace of mind which arises from a knowledge that the property has been so disposed

of as to contribute to the enjoyment and support of others. The comfort experienced by the philanthropist in giving away his property, whether to relatives, friends or strangers, does not seem to us to be the kind of comfort which the testatrix had in mind when she was engaged in making this will. The view for which the tenant contends seems to us a forced and unnatural construction of the language of the will, and inconsistent with the general nature of the business in which the testatrix was engaged while making it.

It follows that, in giving the third, fourth, fifth, seventh and eighth rulings requested by the demandant, and in refusing to rule, as requested by the tenants, that the power given in the will was in effect an absolute and unlimited power to sell and dispose at the discretion of the donee of the power, the court made no error in law.

The next question is whether the power was properly executed. The court found that the transaction between Foster and Mrs. Trow "was a colorable transaction made without consideration, and carried out for the purpose of transferring the property in question so that it might descend to his children regardless of the will," and found for the demandant. It is clear that, upon the construction we have given to the power, the transaction between Foster and Mrs. Trow was not a valid execution of the power if it was as found by the judge. The tenants insist however that the finding was not warranted by the evidence.

It would serve no useful purpose to recite the evidence in detail. We have examined it and have no hesitation in saying that it amply justifies the finding, and that the second and sixth requests of the demandant were properly given.

Although the power was to be exercised at the judgment of the husband, still he was bound to act in good faith. *Hoxie v. Finney*, 147 Mass. 616. *Lovett v. Farnham*, 169 Mass. 1.

The ruling, that the burden was upon the tenants to show a valid execution of the power, was correct. In such a case, at common law, "the demandant . . . may give evidence of the seisin on which he has counted, within the time alleged in his count. Having done this, he must recover, unless this evidence is controlled by the evidence of the tenant; or unless the tenant can show that the entry, which is averred to be a disseisin, was

just, or by judgment of law." Parsons, C. J., in *Wolcot v. Knight*, 6 Mass. 418, 419. In *Newhall v. Hopkins*, 6 Mass. 350, 356, where the demandant had counted upon the seisin of his grandfather, it was stated by the same justice that "it is certainly true, . . . that, if an actual seisin of the ancestor was proved within the time alleged in the writ, the tenant is put to show a rightful entry . . . or the verdict ought to be against him." It is also competent for the tenant, under the general issue, to disprove the seisin of the demandant, as alleged in his writ, by showing that the demandant's grantor had conveyed the title to another prior to his deed to the demandant. Stearns on Real Actions, (2d ed.) 198. *Wolcot v. Knight*, *ubi supra*. *Stanley v. Perley*, 5 Greenl. 369.

Under our statutes, the demandant is no longer required to prove an actual entry under his title, but, if he proves that he is entitled to such an estate as he claims in the premises, and also that he has a right of entry therein at the time the action is commenced, that is deemed sufficient proof of seisin, and he recovers unless the tenant shows a better title in himself. Pub. Sts. c. 173, §§ 3, 4. *Austin v. Cambridgeport Parish*, 21 Pick. 215, 224. There was no question that the testatrix was seised in fee of the premises in dispute at the time of her decease. The demandant claimed as devisee under the will, the tenants under a deed from the donee claimed to have been given in the exercise of the power in the same will. By the will the land went to the husband for life, then to the two sisters of the testatrix during their lives and the life of the survivor, with remainder in fee to the demandant. All these estates vested in the respective devisees at the time of the death of the testatrix, even although they were liable to be defeated by the valid exercise of the power given to the husband to sell in fee simple. *Moore v. Weaver*, 16 Gray, 305. *Whipple v. Fairchild*, 189 Mass. 262. *Brewer v. Stevens*, 18 Allen, 346.

It is not a case where the vesting of the estate depends upon a condition precedent. The demandant, having shown the seisin of the testatrix at the time of her death, the probate of the will, and the death of the tenants for life, proved his title to the premises, and was entitled to recover, unless the tenants proved a better title in themselves. *Newhall v. Hopkins*, 6 Mass. 350, 356.

Pub. Sts. c. 173, § 4. This they undertook to do by proving the execution of the power by the deed to Mrs. Trow. This deed had no tendency to show that the remainder devised to the demandant never was vested in him. It had no bearing whatever upon that question. It was material only on the issue whether he had been divested of his estate. If he had, then the better title was in the tenants, but, unless he had, the tenants failed to show a better title in themselves; and hence, under the rules applicable to the pleadings and proof in real actions, as shown by the authorities and statutes above cited upon this branch of the case, it seems plain that the burden was upon the tenants to show a valid execution of the power.

The ruling, that it was competent for the demandant to prove the pecuniary condition and circumstances of Foster on the date of the deed to Mrs. Trow, was correct. Such evidence was material, as bearing upon the motive and purpose for which the deed was given by Foster, and upon the question whether he was acting in good faith.

The exception to the admission of the entry in the book kept at the registry of deeds is not argued upon the brief of the tenants, and, considering its nature, we regard it as waived.

There remains the exception to the admission of the evidence of one Taylor, who testified that, some years after the making of the deed to Mrs. Trow, and before this suit was brought, Foster said to the witness that he had got his property fixed so that his children should have it, and that he had "deeded it to the old woman Trow because the children would not get it otherwise." This statement, made *in pais* by the grantor in disparagement of his grant in the absence of the grantee, would not be admissible if the grantor had been alive at the time of the trial. *Chase v. Horton*, 143 Mass. 118. The court however admitted the evidence under St. 1898, c. 535. This statute is short, and is as follows: "No declaration of a deceased person shall be excluded as evidence on the ground of its being hearsay if it appears to the satisfaction of the judge to have been made in good faith before the beginning of the suit and upon the personal knowledge of the declarant." It is to be assumed that it appeared to the satisfaction of the presiding justice that the conditions named in the statute existed. The question in dispute

was, whether the transaction between the declarant and Mrs. Trow was *bona fide*, or merely colorable; and, on that question, the intent of the declarant, the grantor, at the time of the making of the deed was a material fact. If he had been alive at the time of the trial, it would have been competent for him to testify as to his intent. The case seems to come strictly within the statute. It is a declaration as to the existence of a material fact, namely, his intent in executing the deed, made by a deceased person in good faith before the beginning of the suit, and upon his personal knowledge. We think the admission of the evidence justified by the statute. If it be said, that this interpretation of the statute renders admissible declarations not theretofore admissible, we can only say that such is its manifest intent.

The statute is general in form, dealing only with a rule of evidence, and, so far as regards civil cases at least, it must be held, in accordance with the general rule in such matters, applicable to cases where the cause of action accrued before, as well as since, its passage. *Commonwealth v. Homer*, 153 Mass. 343. *Brooks v. Holden*, 175 Mass. 137.

Exceptions overruled.

SUPPLEMENT.

OPINION OF THE JUSTICES TO THE HOUSE OF REPRESENTATIVES.

The requirement of the Constitution that representatives "shall be chosen by written vote" may be complied with in voting by a machine which registers each vote cast without the use of separate ballots, and the provisions for sorting and counting the votes for governor and for senators do not prevent the use of machines in voting and in counting the votes cast. HOLMES, C. J., KNOWLTON, & LATHROP, JJ. LORING, J., *concurring*, provided the result of the action of the machine in registering each vote cast is visible to the voter, and the work of the machine in adding up the votes is done under the supervision of some person duly charged with the duty of counting the votes cast. MORTON, BAKER, & HAMMOND, JJ., *dissenting*, on the ground, that the turn of a wheel or dial punching a hole in an unseen roll of paper on which are the names of candidates, by a voter who pulls a lever or turns a key, is not the use of a written vote within the meaning of the Constitution; nor is the inspection of a dial, even if preceded or followed by an inspection of all the cogs and mechanism which have moved the hands of the dial, or the counting of holes in such a paper and the inspection of the machinery which made the holes, the sorting and counting of votes by election officers.

THE following order was passed by the House of Representatives on March 29, 1901, and on April 1 transmitted by the Speaker to the Justices of the Supreme Judicial Court. On April 25 the Justices returned the answer which is subjoined.

Ordered, That the opinion of the Justices of the Supreme Judicial Court be required by the House of Representatives upon the following important question of law:

Has the General Court the right to authorize the use of voting and counting machines at elections by the people of national, state, district, county, city or town officers?

To the Honorable the House of Representatives of the Commonwealth of Massachusetts:

The undersigned Justices of the Supreme Judicial Court having considered the question proposed by the Honorable House

of Representatives, by its order of March 29, 1901, a copy of which is annexed, respectfully submit the following opinion.

The ground for doubt as to the power of the General Court under the Constitution of the Commonwealth is to be found in the requirement that representatives "shall be chosen by written votes," Part 2, c. 1, § 3, art. 3, and in the implication of the provision for sorting and counting the votes for governor, c. 2, § 1, art. 3, and for senator, c. 1, § 2, art. 2. To these may be added the requirement that certain militia officers shall be elected by written vote, c. 2, § 1, art. 10, and articles 16 and 17 of the Amendments, one or both of which might be held to adopt the method of voting for governor for the election of certain other officers. Whether the first mentioned requirement, as to representation, has been repealed by art. 21 of the Amendments, giving the Legislature power to prescribe the "manner of ascertaining" the election of representatives, it is unnecessary to consider, although it may be well to bear that Amendment in mind in weighing the arguments which we shall adduce. Apart from these provisions, no doubt, the general power of the Legislature would extend to authorizing the use of a voting machine. See for example Amendments, art. 19.

With regard to votes for representatives in Congress it is provided by c. 154 of the Statutes of the United States for 1899, that they may be by "voting machine the use of which has been duly authorized by the State law," so that the elections of national officers require no separate consideration.

We assume that the voting machines which the Honorable House has in mind vary in their mode of recording votes, that all of them dispense with the use of a separate piece of paper for each vote, that some of them register a large number of successive votes by successive punches upon one strip of paper, in separate lines for separate candidates, with the names, if necessary, against the lines, and that some of them abandon the use of paper altogether in recording, each vote being marked by the partial revolution of a cog-wheel or other similar device, and the total number being shown by some easily adapted index. If necessary, however, in this class of machines the names of the candidates may appear in writing attached to the point where the voter registers his vote, in such manner as to indicate that

his turning a particular key or pressing a particular knob expresses a vote for the name written above.

The question whether such a machine satisfies whatever requirements or implications there may be in the Constitution of the Commonwealth, depends upon how far we are to follow the line of argument started by Chief Justice Parker in *Henshaw v. Foster*, 9 Pick. 312. In that case it was pointed out, with regard to this very matter, that, as the Chief Justice puts it, "words competent to the then existing state of the community, and at the same time capable of being expanded to embrace more extensive relations, should not be restrained to their more obvious and immediate sense, if, consistently with the general object of the authors and the true principles of the compact, they can be extended to other relations and circumstances which an improved state of society may produce." (p. 317.)

To state in our own way the mode of approaching the question, it is not so important to consider what picture the framers of the Constitution had in their minds, as what benefits they sought to secure, or evils to prevent, — what they were thinking against in their affirmative requirement of writing, and what they would have prohibited if they had put the clause in a negative form. The answer, or a part of it, is given by Chief Justice Parker in the case already cited: "The practice had been to elect many town officers by hand vote, and probably in some instances representatives had been so chosen. It became necessary therefore to prescribe that the choice should be made by ballot; but even the word *ballot* itself is ambiguous, and therefore it was required that representatives shall be elected *by written votes*." No doubt the picture in the minds of those who used the words was that of a piece of paper with the names of the candidates voted for written upon it in manuscript, but the thing which they meant to stop was oral or hand voting, and the benefits which they meant to secure were the greater certainty and permanence of a material record of each voter's act and the relative privacy incident to doing that act in silence. They did not require the signature of the voter, or any means of identifying his vote as his after it had been cast. It was settled by *Henshaw v. Foster* that they did not require manuscript. In our opinion they did not require a separate piece of paper for each voter.

That is to say, by requiring writing they did not prevent the Legislature from authorizing several voters to use a single ballot if the voters all signed it, or in some way sufficiently indicated that a single paper expressed the act and choice of each. It seems to us that the object and even the words of the Constitution in requiring "written votes" are satisfied when the voter makes a change in a material object, for instance, by causing a wheel to revolve a fixed distance, if the material object changed is so connected with or related to a written or printed name purporting to be the name of a candidate for office, that, by the understanding of all, the making of the change expresses a vote for the candidate whose name is thus connected with the device.

So far we have been considering the requirement of written votes alone, and have assumed that all other constitutional conditions are complied with. But it remains to consider whether the result is changed by the provisions as to sorting and counting votes where those provisions apply. These seem to us to raise less difficulty. The provisions do not express a constitutional end; they express merely assumptions that sorting and counting will be necessary if you have written votes, as they would have been necessary a hundred years ago. It would not be true to say that the framers of the Constitution chose the risk of errors incident to sorting and counting in preference to the risk of errors of a different class incident to some different way of finding out the result. They never thought of any other way. Probably the only distinctions which occurred to them concerned different modes of sorting and counting.

It is theoretically possible to exclude by a mechanical device every chance of error in the sorting and counting of votes. Whether that is accomplished by existing machines is a matter about which we have no adequate information, and is a question of fact which it would not fall within our province to determine. We assume that the Legislature before authorizing the use of a machine would satisfy itself that the voter would be sufficiently apprised of what to do in order to vote for his candidate, that the machine really would carry out and express the intent which it purported to be ready to express, that it was of such mechanical perfection as to exclude the possibility of internal error, and that sufficient arrangements were made to prevent external

fraud. Under such circumstances, the sorting and counting of the votes shrink by atrophy to a mere survival, but there is nothing contrary to the Constitution in that. If it be deemed technically necessary that the possibility at least of sorting and counting should remain, it does remain. Whether in the form of successive punches in a line upon paper, or in the marked revolutions of a wheel appropriated to a given candidate, material changes abide which signify by predetermined language the number of votes cast, exactly to the same extent that it would be signified by slips of paper bearing characters in printer's ink. The votes could be counted as cast, if it were necessary. They can be counted afterwards as well. The fact that the index of machinery has cut down the chance of personal error to a minimum surely is not an objection sanctioned by the Constitution.

The views which we express coincide with the opinion of a majority of the judges of the Supreme Court of Rhode Island in regard to the McTammany machine, *In re Voting Machine*, 19 R. I. 729, and with some other discussion of the subject which we have seen.

It is proper to add that we have considered only the answer to the general question. What provisions should be made in the exceptional case of challenged votes, etc., is a question of detail, easily dealt with by special arrangements.

OLIVER WENDELL HOLMES.

MARCUS P. KNOWLTON.

JOHN LATHROP.

I agree with this conclusion, provided the result of the action of the machine in registering each vote cast is visible to the voter casting the vote, and the work of the machine, in adding up the votes cast, is done under the supervision of some person duly charged with the duty of counting the votes cast.

I agree that machinery can be used by the voter in making a written vote within the meaning of the Constitution, and also that there is nothing in the Constitution which forbids machinery being used in counting the votes cast.

The first difficulty, in holding that the provisions of the Constitution are complied with by any one of the several voting machines which are now in use (so far as I know), comes from

the fact that in none of them can the voter see what his written vote is. In the method of voting prescribed by the Constitution, the voter knows what the written vote cast by him is. It is manifest, that the use of a voting machine, which records a written vote without disclosing to the voter what that vote is, involves chances of error quite different from those involved in the method of voting contemplated by the Constitution. There are similar difficulties arising from the fact, that the addition of the several votes cast made by many of the voting machines, is also invisible, and that the correctness of the result produced by the machine depends entirely upon the machine's having made the addition correctly in the first instance, without the possibility of knowing whether that addition was or was not correctly made, and without the possibility of correcting it, if it was not correctly made. And again, the only guard against a voter's casting more than one vote lies in the fact, that the mechanical device, put into the machine to prevent double voting, has worked correctly, and in that fact alone, without there being any means of knowing whether it did, or did not, work correctly, and without the possibility of correcting such an error if one were committed.

It is manifest that in the matter of the record made by the machine being in each instance what the voter intended his vote should be, in the matter of the several votes cast being correctly added together by the machine, and in the matter of double voting, the chances of error involved, where the result of an election is made to depend wholly upon the result produced by the voting machine, are quite different from those incident to the method of voting contemplated by the Constitution, at least so far as the voting machines now in use are concerned. And, in my opinion, the chances of error to which I have referred are so far different, as to forbid votes cast and counted only by such a machine, being held to be a compliance with the provisions of the Constitution in that connection.

It is evident that the use of voting machines which I have suggested would destroy to a great extent the secrecy of the ballot; but I find nothing in the Constitution requiring that the written vote there provided for should be a secret one.

It has been suggested that a machine could be devised, which would indicate that a vote had been cast for some person for a

designated office, without disclosing the person voted for; and that by the use of such a machine the secrecy of the ballot could be maintained and the requirements of the Constitution met. In my opinion, the use of such a machine would not meet the requirements of the Constitution.

WILLIAM CALEB LORING.

To the Honorable the House of Representatives of the Commonwealth of Massachusetts:

The undersigned Justices of the Supreme Judicial Court respectfully submit the following, as their opinion upon the question of law stated in your order of March 29, 1901, which question is:

“Has the General Court the right to authorize the use of voting and counting machines at elections by the people of national, state, district, county, city or town officers?”

First. As to county, city and town officers, and as to officers chosen by districts, other than councillors, senators and representatives, we know of no constitutional restriction upon the power of the General Court to direct the manner of choice.

Second. As to councillors, senators and representatives, and as to the governor, lieutenant governor, secretary, treasurer and receiver general, auditor and attorney general, there are constitutional provisions which must be considered in answering your question.

The provisions to which we refer are these:

Declaration of Rights, art. 9. “All elections ought to be free. . . .”

Part 2, c. 1, § 1, art. 4. “And further, full power and authority are hereby given and granted to the said General Court, from time to time to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this Constitution, as they shall judge to be for the good and welfare of this Commonwealth, and for the government and ordering thereof, and of the subjects of the same, and for the necessary support and defence of the government thereof; and to name

and settle annually, or provide by fixed laws, for the naming and settling all civil officers within the said Commonwealth; the election and constitution of whom are not . . . otherwise provided for. . . .”

Chapter 1, § 2, art. 2. “The senate shall be the first branch of the legislature; and the senators shall be chosen in the following manner, viz. . . . The selectmen of the several towns . . . shall receive the votes of all the inhabitants of such towns . . . and shall sort and count them in open town meeting, and in presence of the town clerk, who shall make a fair record, in presence of the selectmen, and in open town meeting, of the name of every person voted for, and of the number of votes against his name; and a fair copy of this record shall be attested by the selectmen and the town clerk, and shall be sealed up, directed to the Secretary of the Commonwealth for the time being, with a superscription, expressing the purport of the contents thereof, and delivered by the town clerk of such towns, to the sheriff of the county in which such town lies. . . .”

Chapter 1, § 3, art. 3. “Every member of the house of representatives shall be chosen by written votes.”

Chapter 2, § 1, art. 3. “Those persons . . . qualified . . . within the several towns of this Commonwealth, shall, at a meeting to be called for that purpose, . . . annually, give in their votes for a governor, to the selectmen, who shall preside at such meetings; and the town clerk, in the presence and with the assistance of the selectmen, shall, in open town meeting, sort and count the votes, and form a list of the persons voted for, with the number of votes for each person against his name; and shall make a fair record of the same in the town books, and a public declaration thereof in the said meeting; and shall, in the presence of the inhabitants, seal up copies of the said list, attested by him and the selectmen, and transmit the same to the sheriff of the county. . . .”

Chapter 2, § 1, art. 10. “The captains and subalterns of the militia, shall be elected by the written votes of the train band and alarm list of their respective companies; the field officers of regiments shall be elected by the written votes of the captains and subalterns of their respective regiments; the brigadiers shall be elected, in like manner, by the field officers of their respective brigades. . . .”

Chapter 2, § 2, art. 1. "There shall be annually elected a lieutenant governor . . . in the same manner with the governor. . . ."

Amendments, art. 16. "Eight councillors shall be annually chosen by the inhabitants of this commonwealth, qualified to vote for governor. The election of councillors shall be determined by the same rule that is required in the election of governor. . . . The day and manner of the election, the return of the votes, and the declaration of the said elections, shall be the same as are required in the election of governor. . . ."

Art. 17. "The secretary, treasurer and receiver-general, auditor, and attorney-general, shall be chosen annually. . . . The qualification of the voters, the manner of the election, the return of the votes, and the declaration of the election, shall be such as are required in the election of governor. . . ."

Art. 21. ". . . The manner of calling and conducting the meetings for the choice of representatives, and of ascertaining their election, shall be prescribed by law. . . ."

Art. 22. ". . . Each district shall elect one senator. . . ."

Art. 24. "Any vacancy in the senate shall be filled by election by the people of the unrepresented district, upon the order of a majority of the senators elected."

In our opinion, the requirements as to the choice of senators found in Part 2, c. 1, § 2, art. 3, of the Constitution, were not abrogated by articles 22 and 24 of the Amendments, nor was the provision of Part 2, c. 1, § 3, art. 3, that "Every member of the house of representatives shall be chosen by written votes," abrogated by art. 21 of the Amendments.

The provision that representatives shall be chosen by written votes was before this court in the year 1830, in the case of *Henshaw v. Foster*, 9 Pick. 312, in which decision it was held that printed votes are written votes within the meaning of the provision.

The same decision states the general considerations which should have weight in construing the provision, and with that statement we agree: "In construing so important an instrument as a constitution, especially those parts which affect the vital principle of a republican government, the elective franchise, or the manner of exercising it, we are not, on the one hand, to in-

dulge ingenious speculations, which may lead us wide from the true sense and spirit of the instrument; nor on the other, to apply to it such narrow and constrained views as may exclude the real object and intent of those who framed it. We are to suppose that the authors of such an instrument had a thorough knowledge of the force and extent of the words they employ, that they had a beneficial end and purpose in view, and that more especially in any apparent restriction upon the mode of exercising the right of suffrage, there was some existing or anticipated evil which it was their purpose to avoid.

“If an enlarged sense of any particular form of expression should be necessary to accomplish so great an object as the convenient exercise of the fundamental privilege or right, that of election, such sense must be attributed. We are to suppose that those who were delegated to the great business of distributing the powers which emanated from the sovereignty of the people, and to the establishment of rules for the perpetual security of the rights of person and property, had the wisdom to adapt their language to future as well as existing emergencies; so that words competent to the then existing state of the community, and at the same time capable of being expanded to embrace more extensive relations, should not be restrained to their more obvious and immediate sense, if, consistently with the general object of the authors and the true principles of the compact, they can be extended to other relations and circumstances which an improved state of society may produce.”

The decision from which we have quoted applied these principles; and because printing was, in law, writing from a time before that when the Constitution was made, and because the use of printed votes was equally well calculated to avoid the evils which the framers of that instrument thought would attend elections if conducted by nomination and hand vote, or *viva voce*, the court held that printed votes were constitutional, although the uniform practice had been, for some fifty years, to use manuscript votes only.

The same decision says further: “This requisition of written votes in the constitution is confined to the choice of representatives. The important election of governor, senators and counselors, is left unprovided for in this respect, except by implication,

and that implication does not exclude printed votes. The votes of all the different communities were to be sorted and counted, and a certificate of the result transmitted to a common focus, the secretary's office, where they were to be examined and compared. This process *necessarily* requires tickets or ballots, so that there was no occasion to require expressly that the votes should be in writing or in print. There can be no ground to exclude printed votes for these state officers, for all that is required is that they should be so given as that they may be sorted and counted."

Bearing in mind the statement of the Declaration of Rights that "All elections ought to be free," and also the general rules laid down in the case of *Henshaw v. Foster*, we have examined the published laws under which, during our colonial and provincial periods and the interval between the Declaration of Independence and the inauguration of our present government, officers have been chosen or appointed. Without giving the citations, it is enough to say that such an examination shows that while higher officers often were chosen by the casting of separate paper votes by the individual voters, some elections were made by the use of Indian corn and beans, as ballots, and that as to much the greater number of officers chosen by the people there was no specific direction as to the manner in which the choice of the individual voter should be expressed; but representatives to the General Court were selected by the voters in town, district or plantation meetings, the votes being given under statutory directions as to the manner of voting, contained in Prov. St. 1693-4, c. 14, §§ 2, 6, 7; 1 Prov. Laws, (State ed.) 147. These directions provide that no voter shall put in more than one vote for any one person, and that "All persons shall put in their votes, unfolded, to the selectmen or constables appointed to receive the same." These provisions plainly imply that the only legal method of voting for representatives under the provincial government was for each voter to put in his own separate written vote. An examination of the printed records of the town of Boston shows that this was the method there used up to 1780, and the only reason we have found for supposing that representatives to the General Court of the Province ever were chosen by nomination and hand vote, or *viva voce*, is

the statement in the decision in *Henshaw v. Foster*, at page 319, that "probably in some instances representatives had been so chosen."

In most elections the votes given in at town meeting were not preserved after the declaration of the result in open meeting. But in the case of the nomination of magistrates or assistants under the Massachusetts Bay Colony charter, the votes cast in the meetings were there sealed up and then carried to the shire towns, and from each shire town to Boston, where they were finally opened, and the result of the voting in the towns and plantations ascertained. And in the case of county treasurers and registers of deeds under the provincial government, the votes given in by the individual voters at the town meetings were thus sealed up, and taken to the Court of Sessions of the county, and opened and sorted in the presence of the justices by men appointed by them for the purpose, and the result thus ascertained in that court.

Interpreting the Constitution in the light of the circumstances existing at the time of its adoption, as well as of the laws and customs which had theretofore prevailed, we think that the language prescribing the way in which the will of the voters shall be expressed and ascertained in the case of the election of governor and of the other State officers, where similar language is used, necessarily implies at least that the choice of the voter shall be indicated by some kind of writing upon a paper or other material thing, that this material thing bearing this written expression of the choice of the voter shall by his act of voting pass from his possession and control into that of the officers charged with the duty of conducting the election, and that the voter shall have reasonable opportunity to see that it has so passed, that it shall be distinct from that handed in by any other voter, and that these written votes so handed in shall continue to be the same material things capable of being handled, sorted and counted, and that the whole work of ascertaining and declaring the result shall be the personal act of these election officers, with the written votes before them, the sorting and counting as well as the declaration of the result being done by sworn officers. One reason for the requirement of a written vote is that the voter may have a reasonable opportunity of making his

choice without immediate influence upon the part of others; and the reason for the requirements applicable to the sorting and counting is that the votes may not fail of their proper force by reason of mistake or fraud in the count. The safeguard erected by the Constitution is that there shall remain after the closing of the voting, in a material form, capable of being read and understood by men, a written vote cast by each voter; and that all these individual votes, each given by the voter to the election officers, shall be read, sorted, and counted in accordance with the several tenor of each, by men acting under the sanction and obligation of their respective official oaths.

So far as we have been informed as to the nature of the machines mentioned in your order, none of them provides for or allows the individual voter to have in his own hands a paper or other material thing bearing upon itself the expression of his choice; none of them allows him to cast or deposit in the custody of the election officers a paper or other material thing bearing such expression as his individual written vote; and none of them, upon the casting of the vote, or at the closing of the polls, places in the hands of the election officers a separate material thing given in by the voter, which the officers can handle, sort and count. None of them is so built or worked that the voter can know, that, unless sworn officers err or are false to their oaths, the choice which the Constitution commands him to express by "written vote," will be counted, and counted as he cast it. Yet to give him that certainty, and to give the State the safeguard which comes from his having that certainty, is one purpose of the constitutional requirement of "written votes," "sorted and counted" in open meetings, so that each vote must have its legitimate weight in the election, unless an intelligent and responsible man fails in the performance of a simple, sworn duty.

The turn of a wheel or a dial, the punching of a hole in an unseen roll of paper on which are the names of candidates, by a voter who pulls a lever or turns a key, is not the use of a written vote within the meaning of the Constitution; nor is the inspection of a dial, even if preceded or followed by an inspection of all the cogs and mechanism which have moved the hands of the dial, or the counting of holes in such a paper and the inspection

of the machinery which made the holes, the sorting and counting of votes by election officers. If it be said that these are the best and most efficient means to secure a free and honest election, the answer is that they are not the means prescribed for those ends by the Constitution. The Constitution does not authorize the General Court to put the expression of the voter's will to the chance of being nullified or perverted by slipping cogs, defective levers or other mechanical devices which have no living intelligence, no conscience and no liability to punishment to insure their going right. It requires that every step in the task of seeing that votes, whether given by Indian corn and beans or other ballots, by show of hands, by the living voice or by paper writing, are counted rightly, shall be intrusted to and performed, not by an inanimate machine but by sworn officers, and in open meeting, where each step of the work can be verified and mistakes corrected.

In our opinion, the General Court has not the right to authorize the use of the machines mentioned in your order, at elections by the people of the Governor, the Lieutenant Governor, the Councillors, Senators and Representatives, the Secretary, the Treasurer and Receiver General, the Auditor or the Attorney General.

A law of Congress requires votes for Representatives in Congress to be by written or printed ballot or voting machine, the use of which has been duly authorized by State law. In our opinion the General Court has the right to authorize the use of the machines referred to in your order in elections for Representatives in the Congress of the United States.

In the case of electors for President and Vice-President, it might, perhaps, be different, although long usage has given to the manner in which they are now chosen almost the force of an inviolable sanction.

JAMES M. MORTON.

JAMES M. BARKER.

JOHN W. HAMMOND.

ON FEBRUARY 4, 1901, the one hundredth anniversary of the day on which JOHN MARSHALL took his seat as Chief Justice of the Supreme Court of the United States, which was celebrated throughout the country as John Marshall day, the full court came in at ten o'clock A. M., Chief Justice HOLMES, and Justices MORTON, LATHROP, HAMMOND and LORING being present and also His Excellency WINTHROP MURRAY CRANE, Governor of the Commonwealth, who sat at the right of the Chief Justice.

Upon the opening of the court, the Attorney General addressed the court as follows :

May it please the court : Upon this morning, a century ago, the Supreme Court of the United States assembled for the first time in the city of Washington. The term city was one of courtesy rather than of description ; for it was a place of swamps and woods, a city without inhabitants, a town without houses. Even Pennsylvania Avenue, to-day the most distinctly national, if not the most historic, street in America, was a morass covered with underbrush, impassable to horse or foot, without visible demarcation, a tangled wilderness. There was only the dream of a capital. But in that city and upon the very eminence where it met this day one hundred years ago, the court has since always been held, though more than once within sound, even within the very sight, of the guns of the enemies of the Republic.

It happened, moreover, that on this same day, and in this same place, the commission of a new chief justice was read ; and the term was presided over for the first time by one who was destined, for more than a third of the century that has since intervened, to direct and control the policy of the court, and to establish the place which it has since maintained, not only as one of the three great and co-ordinate departments of the Government of the Republic, but also as the most august and powerful tribunal in the civilized world. This new chief justice was John Marshall of Virginia.

The bar of the United States has deemed these two auspicious events of sufficient moment to deserve the attention of the courts upon the occasion of this anniversary. Occurring, by one of those signal coincidences with which history is replete, upon the first judicial day of the nineteenth century, they also marked the birth and beginning, if not the creation and the cause, of the national grandeur which has characterized that century. Indeed, so closely have we come to trace cause and effect between the judgments of that court and the growth of the nation, that to-day, even upon this threshold of another century, when, as then, men are at issue upon a momentous question of the future policy of the United States, the voice of clamor is hushed, and Congress waits until this same august tribunal pronounces the decree which shall bind or expand, as the case may be, the wings of national ambition.

Up to that time the importance of the Supreme Court in the scheme of the Federal Government had scarcely been appreciated. In the original proposals for the erection of a capitol, prepared, I believe, under the direction of George Washington himself, no provision was made for the accommodation of the court. The founders of the nation had inherited the traditions of the mother country, where, owing to the absolute power of Parliament, the function of the judiciary was limited to the settlement of private disputes, its only relation to the Government being on the criminal side. The idea of enforcement of constitutional limitations by the judiciary upon the other departments of the Government and upon the States, axiomatic as such doctrines appear to us, was at that time by no means understood, much less conceded.

Even the justices themselves failed to realize their importance. Appointments to the bench were often declined, and resignations were frequent. Some judges retired to go upon the bench of a State court. Both of the chief justices who preceded Marshall (not counting Rutledge, whose appointment was not confirmed, and who presided only one term) resigned their offices to become ministers to foreign courts, and Jay, the first chief justice, when asked after an interval of retirement to resume his position, declined, saying, "I left the bench perfectly convinced that, under a system so defective, it could not attain

the energy, weight, and dignity which were essential to its affording due support to the national Government."

The whole business of the court during the first eleven years of its existence is recorded in less than a single volume of the size of current reports. Most of the questions before it concerned procedure and practice in the federal courts. The meagre decisions touching the scope of its own powers and duties, were for the most part confined to denial rather than assertion, like its refusal to advise the President, and its deciding, or rather its hesitation in deciding, in *Hayburn's case*, that Congress could not impose upon it the duty of acting as auditor to hear pension claims. It did assert the right to hear the case of a citizen against a State, and to enter judgment against the State; but this right was promptly taken away by an amendment to the Constitution. Even Marshall continued to be a member of the President's Cabinet after his appointment to the bench, until the close of the presidential term. So little was the true function of the court understood that one of the earliest cases reported seems to have consisted of the trial of issues of fact by a jury, the charge being given by one of the justices. It had been a court of weak beginnings and of insignificant achievements. It had not found its place in the scheme of the Government. When the nineteenth century came in its great work was yet before it.

The Federal Constitution was no spontaneous utterance of a united people. It was the result of a long, a bitter, and unending contest. The conflict between the sovereignty of the State and the sovereignty of the nation did not then begin, nor is it yet ended. Although, when the only alternative in sight was anarchy, a sullen assent was vouchsafed to the terms of the Constitution, both sides reserved the right to continue the contest. Both claimed that it could be interpreted to meet their views. Moreover, upon its adoption other contentions arose upon the question of how far it acted as a restraint upon the executive and the legislative departments. The beginning of this century saw these contentions, and especially that relating to the sovereignty of the States, existing in all their fierceness, threatening the destruction of the Republic. The nation was at the parting of the ways.

The only power adequate to the settlement of these questions under the Constitution (and even this was not then conceded) was the Supreme Court. But a chief was needed to direct the work of that court, who should have the courage to assert its dignity and power. He must be one who had participated in the discussions leading to the adoption of the Constitution, familiar with its origin and its history. He must be not only a great and sound lawyer, but one whose public career, no less than the spotlessness of his personal reputation, had earned for him the respect and confidence of all men. He must be one who was willing to put aside all private ambition, and make it his life work to establish the rank of the court given to it by the Constitution, but which hitherto had scarcely been conceded to it; in concession to her importance it were better that he be a citizen of Virginia; and John Adams naturally believed he should be a Federalist. He found all these essentials in John Marshall. The hour of fate had come; and he was the man of the hour.

Speculations on what might have been the result had important events happened otherwise than they did, are usually profitless. But one cannot forbear indulging in a shudder at the contemplation of what might have been the destiny of the nation had the appointment of chief justice been made a few months later by that apostle of the anti-Federalists, Thomas Jefferson. One experiment of a league of sovereign States had been tried and had failed. Another would have meant hopeless wreck. More than once, as we review the events of our history, are we led to recognize with reverence the hand of an overruling Providence, guiding our path, shielding us from danger and destruction, chastening us when we have gone astray, and leading us on to become the lamp of liberty enlightening the world.

John Marshall grasped the helm with the hand of a master. There was no chart to guide his course, excepting his conception of the spirit of the Constitution. But that conception was based upon a belief in the sovereignty of the nation, and was elevated by a conviction of the power and dignity of the judicial branch of the Government. Within three years he had disposed of a contention, seriously made, that Congress was not bound by the Constitution, excepting as it might interpret for itself the terms

of that instrument. He pronounced one of its statutes void, and thus asserted the supremacy of his court over the legislative department,—a supremacy which has never since been challenged, and which it is difficult for us now to conceive ever to have been challenged. Soon after he pronounced void an act of a State legislature which was in violation of the Constitution of the United States. Then men began to appreciate the fact that the Federal power was supreme, and that, under the interpretation of John Marshall, the Constitution did not provide a mere rope of sand for the States, but was the strong tie which bound them together into a nation.

From these sound beginnings he proceeded with unfaltering steps, literally building up a nation upon the foundation of the Constitution. His views did not at first, nor even during his life, meet with universal acquiescence. During the whole of the two generations of his judicial service, he was the subject of bitter criticism, and more than once there was almost open revolt. He himself at times became disheartened, and in a letter to his associate, Joseph Story, in 1832, he said: "I yield slowly and reluctantly to the conviction that our Constitution cannot last." This was but three years before his death, and it may well be that his last hours were clouded with doubts of the future of his country. But he had builded more wisely and surely than he knew. His interpretation of the spirit of the Constitution, besides having the weight of authority, came eventually to be accepted as well for the truth of its resistless logic. He was not merely a great and learned judge. There have been others. His title to the eternal gratitude of his countrymen is found in the fact that he was the creator of constitutional government, as we now understand that term. The result of his work is the grandeur of the imperial flag under which we live.

Of the life and career of John Marshall it is not for me to speak in detail on this occasion. It will be better done on this anniversary by others more competent for the task. Beyond declaring his part in the growth of the nation, as I have briefly attempted to do, I will content myself with observing that, considered merely as a judge, his career was a model for all who have come after. Dignified and genial, patient in attention, learned and logical, luminous and convincing in opinions; wel-

coming the help that the bar can give to the court; not lacking in respect for the executive and legislative departments, and for that presumption of right which should be accorded to them, but never forgetting that the function of the court is to be true to its own lights and not subservient to the standard of the Legislature,— he created for the court a respect and esteem which has never since been shaken, and established a standard of judicial deportment which may well be followed to-day.

But it is by the high principles he promulgated and upheld, and upon which this nation has grown to grandeur, rather than by any mere judicial eminence, that he will be remembered while the nation endures.

As I stood, last month, upon the steps of the national Capitol, I was led to contrast in my mind the splendid panorama there unfolded with the rude beginnings of a century ago. But I also reflected that in the luminous clearness of John Marshall's vision there has been, there can be, no advance. A hundred years hence the material achievements of the nation may eclipse those of to-day, even as we have surpassed those of the founders of the Republic; or, on the other hand, some future Marius may contemplate from the same eminence upon which I stood the ruins of a great nation. The things of this world pass away and are forgotten. But the prophetic wisdom and truth of the principles enunciated by John Marshall will endure as long as the nation lives, and his courage and sagacity in discovering and establishing them will be his deathless renown.

In view of the solemnity of this anniversary and of what it means to us and to our fathers and to our children as well, I have the honor to suggest in behalf of my associates that the work of the court be suspended for the day, that the bar and the court may appropriately celebrate the occasion; and to that end I move that the court do now adjourn.

CHIEF JUSTICE HOLMES responded as follows: As we walk down Court Street in the midst of a jostling crowd, intent like us upon to-day and its affairs, our eyes are like to fall upon the small, dark building that stands at the head of State Street, and, like an ominous reef, divides the stream of business in its course to the gray cliffs that tower beyond. And, whoever we may be,

we may chance to pause and forget our hurry for a moment, as we remember that the first waves that foretold the coming storm of the Revolution broke around that reef. But, if we are lawyers, our memories and our reverence grow more profound. In the old State House, we remember, James Otis argued the case of the writs of assistance, and in that argument laid one of the foundations for American constitutional law. Just as that little building is not diminished, but rather is enhanced and glorified, by the vast structures which somehow it turns into a background, so the beginnings of our national life, whether in battle or in law, lose none of their greatness by contrast with all the mighty things of later date, beside which, by every law of number and measure, they ought to seem so small. To us who took part in the Civil War, the greatest battle of the Revolution seems little more than a reconnoissance in force, and Lexington and Concord were mere skirmishes that would not find mention in the newspapers. Yet veterans who have known battle on a modern scale, are not less aware of the spiritual significance of those little fights, I venture to say, than the enlightened children of commerce who tell us that soon war is to be no more.

If I were to think of John Marshall simply by number and measure in the abstract, I might hesitate in my superlatives, just as I should hesitate over the battle of the Brandywine if I thought of it apart from its place in the line of historic cause. But such thinking is empty in the same proportion that it is abstract. It is most idle to take a man apart from the circumstances which, in fact, were his. To be sure, it is easier in fancy to separate a person from his riches than from his character. But it is just as futile. Remove a square inch of mucous membrane, and the tenor will sing no more. Remove a little cube from the brain, and the orator will be speechless; or another, and the brave, generous and profound spirit becomes a timid and querulous trifler. A great man represents a great ganglion in the nerves of society, or, to vary the figure, a strategic point in the campaign of history, and part of his greatness consists in his being *there*. I no more can separate John Marshall from the fortunate circumstance that the appointment of chief justice fell to John Adams, instead of to Jefferson a month later, and so gave it to a Federalist and loose constructionist to start the

working of the Constitution, than I can separate the black line through which he sent his electric fire at Fort Wagner from Colonel Shaw. When we celebrate Marshall we celebrate at the same time and indivisibly the inevitable fact that the oneness of the nation and the supremacy of the national Constitution were declared to govern the dealings of man with man by the judgments and decrees of the most august of courts.

I do not mean, of course, that personal estimates are useless or teach us nothing. No doubt to-day there will be heard from able and competent persons such estimates of Marshall. But I will not trench upon their field of work. It would be out of place when I am called on only to express the answer to a motion addressed to the court and when many of those who are here are to listen this afternoon to the accomplished teacher who has had every occasion to make a personal study of the judge, and again this evening to a gentleman who shares by birth the traditions of the man. My own impressions are only those that I have gathered in the common course of legal education and practice. In them I am conscious, perhaps, of some little revolt from our purely local or national estimates, and of a wish to see things and people judged by more cosmopolitan standards. A man is bound to be parochial in his practice—to give his life, and if necessary his death, for the place where he has his roots. But his thinking should be cosmopolitan and detached. He should be able to criticise what he reveres and loves.

The "Federalist," when I read it many years ago, seemed to me a truly original and wonderful production for the time. I do not trust even that judgment unrevised when I remember that the "Federalist" and its authors struck a distinguished English friend of mine as finite; and I should feel a greater doubt whether, after Hamilton and the Constitution itself, Marshall's work proved more than a strong intellect, a good style, personal ascendancy in his court, courage, justice and the convictions of his party. My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very

tissue of the law. The men whom I should be tempted to commemorate would be the originators of transforming thought. They often are half obscure, because what the world pays for is judgment, not the original mind.

But what I have said does not mean that I shall join in this celebration or in granting the motion before the court in any half-hearted way. Not only do I recur to what I said in the beginning, and remembering that you cannot separate a man from his place, remember also that there fell to Marshall perhaps the greatest place that ever was filled by a judge; but when I consider his might, his justice, and his wisdom, I do fully believe that if American law were to be represented by a single figure, sceptic and worshipper alike would agree without dispute that the figure could be but one alone, and that one John Marshall.

A few words more and I have done. We live by symbols, and what shall be symbolized by any image of the sight depends upon the mind of him who sees it. The setting aside of this day in honor of a great judge may stand to a Virginian for the glory of his glorious State; to a patriot for the fact that time has been on Marshall's side, and that the theory for which Hamilton argued, and he decided, and Webster spoke, and Grant fought, and Lincoln died, is now our corner-stone. To the more abstract but farther-reaching contemplation of the lawyer, it stands for the rise of a new body of jurisprudence, by which guiding principles are raised above the reach of statute and State, and judges are entrusted with a solemn and hitherto unheard-of authority and duty. To one who lives in what may seem to him a solitude of thought, this day — as it marks the triumph of a man whom some Presidents of his time bade carry out his judgments as he could — this day marks the fact that all thought is social, is on its way to action; that, to borrow the expression of a French writer, every idea tends to become first a catechism and then a code; and that according to its worth his unhelped meditation may one day mount a throne, and without armies, or even with them, may shoot across the world the electric despotism of an unresisted power. It is all a symbol, if you like, but so is the flag. The flag is but a bit of bunting to one who insists on prose. Yet, thanks to Marshall and to the men of his genera-

tion — and for this above all we celebrate him and them — its red is our life-blood, its stars our world, its blue our heaven. It owns our land. At will it throws away our lives.

The motion of the bar is granted, and the court will now adjourn.

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3. One having a written contract with a landowner, for lathing and plastering a certain building, executed an instrument which, after describing the contract read as follows: This contract "I hereby transfer and assign to A. B., who will collect the payments according to the contract, and to whom all moneys are to be paid. And I do hereby constitute and appoint the said A. B. and his assigns to be my attorney irrevocable in the premises, to do and perform all acts, matters, and things touching the premises, in the like manner to all intents and purposes as I could if personally present." Below this instrument there was signed by the landowner the following assent: "I assent to above assignment and agree to pay A. B. according to contract." *Held*, that this instrument was not an assignment of the contract but merely an order or power of attorney to receive the payments under it. *Williams v. Weinbaum*, 238.

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BANKRUPTCY ACT.

Unlawful Preference.

1. The transfers of property by a debtor described in the opinion in this case were *held* to constitute both in effect and in purpose a preference under the United States bankruptcy act of 1898, and the transactions including those transfers were *held* to be in fraud of the bankruptcy act in that they prevented and were intended to prevent a large portion of the debtor's property from being administered in bankruptcy, and also to be fraudulent at common law in that they were intended to place certain property of the debtor beyond the reach of his creditors. *Allen v. French*, 539.

Set-off and Counterclaim.

2. Under section 68 of the bankruptcy act, U. S. St. of July 1, 1898, in regard to set-offs and counterclaims, a liquidated mutual credit may be set off by a debtor of the bankrupt sued by the trustee in bankruptcy, notwithstanding the fact that it could not be proved in the bankruptcy proceedings. In the provision of the section above named, that a set-off shall not be allowed which is not provable against the estate, the word "provable" means provable in its nature at the time when the set-off is claimed not provable in the pending bankruptcy proceedings. *Morgan v. Wordell*, 350.

Non-surrender of Preference. Subrogation.

3. A surety, who has paid a claim primarily due from a bankrupt and seeks to prove such payment against the bankrupt as subrogated to the rights of the creditor under § 57 i of the United States bankruptcy act of 1898, is subject to all the disabilities attached to the creditor whose claim he paid; and if such creditor had received a preference from the bankrupt which he had not surrendered, as required by § 57 g before any claim could be proved by him, this bars the surety from proving his claim by subroga-

tion, although the preference was an entirely separate transaction with which the surety had nothing to do, and it cannot be objected that the adjudication against the creditor as to the preference is *res inter alios* and therefore not evidence against the surety, because the surety stands in the shoes of the creditor and for the purpose of proving his claim is the same person. *Morgan v. Wordell*, 350.

BILLS AND NOTES.

Actions on.

An action on a negotiable promissory note indorsed to another by the payee must be brought by the indorsee in his own name and not in the name of the payee, at any rate not without his consent. *Cotting v. Foster*, 564.

As to rights of assignee under an assignment of part of note, see **ASSIGNMENT**, 2.

As to usage of banks sending notes through clearing-house, see **USAGE**.

BOND.

Probate Bond.

1. A probate bond in the ordinary form filed in the registry of probate, satisfactory to the beneficiaries and accepted orally by the judge of probate but never approved by him in writing as required by Pub. Sts. c. 143, § 2, is valid at common law, and the sureties are liable upon it in a suit brought in the name of the judge of probate. Whether such bond is invalid as a statutory bond *quære*. *McIntire v. Linehan*, 263.
2. Where, in a probate bond in the ordinary form, the principal is described as trustee under a certain will for two beneficiaries named, whereas in fact there are also other beneficiaries not mentioned, this omission will be regarded as a mistake, the plain intention being that the bond should be security for all persons beneficially entitled. *Ibid*.
3. The granting by a judge of probate of a petition for leave to bring suit in his name against the sureties on a trustee's bond, settles nothing but the leave to sue and cannot affect any question of liability upon the bond. *Ibid*.

Extent of liability of surety on probate bond, see **SURETY**.

Extension by district court of time for filing appeal bond, see **PRACTICE**, **CIVIL**, 3, 4.

BOSTON.

Liability of, for injuries resulting from negligence of park commissioners, see **DAMAGES**, 7.

Not a necessary party to information concerning Westminster Chambers, see **EQUITY PLEADING AND PRACTICE**, 2.

BOSTON PARK COMMISSION.

Statute creating, gives remedy by petition for damages only for property taken by eminent domain, see **DAMAGES**, 7.

BROKER.

Commission for procuring loan, see AGENCY.

CHAMPERTY.

The defence of champerty to an action by an attorney for his fees is matter in confession and avoidance and the burden is on the defendant to prove it. *Hadlock v. Brooks*, 425.

An agreement to prosecute a suit on shares is not necessarily champertous, see CONTRACT, 1, 2.

CHICOPEE.

Almoner of, is not head of a principal department or a judicial officer, see CIVIL SERVICE ACT, 2; MUNICIPAL CORPORATIONS, 1.

Overseers of the poor of, heads of a principal department, see CIVIL SERVICE ACT, 3.

CIVIL SERVICE ACT.

1. The civil service commissioners have power to require offices involving confidential relations between the incumbent and his superior, which are not by statute exempted from their rules, to be filled under the rules, or so may classify them that they will be free. *Attorney General v. Trehy*, 188.
2. The almoner of Chicopee, appointed annually by the overseers of the poor of that city, is not a head of a principal department, and his appointment is subject to the rules made by the civil service commissioners. *Ibid.*
3. *Seem*, that the overseers of the poor of the city of Chicopee are heads of a principal department and as such exempted from classification under the civil service laws. *Ibid.*
4. The almoner of Chicopee is not a judicial officer. *Ibid.*

COLLATERAL INHERITANCE TAX.

How and on what assessed, see TAX, 11, 12.

CONDITION.

Sworn certificate of physician required by by-laws condition precedent to claiming sick benefits of a beneficiary association, see CONTRACT, 10.

CONSTITUTIONAL LAW.*Rule of Construction.*

1. If a statute can be given a reasonable construction which will sustain it as constitutional, it is the duty of the court so to construe it, although its passage by the Legislature may have been requested or advocated on a

ground which would not be a constitutional justification for its enactment. *Attorney General v. Williams*, 330.

Use of Machines in Voting.

2. The requirement of the Constitution that representatives "shall be chosen by written vote" may be complied with in voting by a machine which registers each vote cast without the use of separate ballots, and the provisions for sorting and counting the votes for governor and for senators do not prevent the use of machines in voting and in counting the votes cast. HOLMES, C. J., KNOWLTON, & LATHROP, JJ. LORING, J., *concurring*, provided the result of the action of the machine in registering each vote cast is visible to the voter, and the work of the machine in adding up the votes is done under the supervision of some person duly charged with the duty of counting the votes cast. MORTON, BARKER, & HAMMOND, JJ., *dissenting*, on the ground, that the turn of a wheel or dial punching a hole in an unseen roll of paper on which are the names of candidates, by a voter who pulls a lever or turns a key, is not the use of a written vote within the meaning of the Constitution; nor is the inspection of a dial, even if preceded or followed by an inspection of all the cogs and mechanism which have moved the hands of the dial, or the counting of holes in such a paper and the inspection of the machinery which made the holes, the sorting and counting of votes by election officers. *Opinion of the Justices*, 605.
3. By U. S. St. 1899, c. 154, votes for representatives in Congress may be by "voting machine the use of which has been duly authorized by the State law," and the General Court has the right to authorize such use. *Ibid.* [This is not in the head note, but all the justices concurred in it. Reporter.]

Eminent Domain.

4. St. 1899, c. 457, limiting the height of buildings within a certain described territory west of the State House in Boston to seventy feet, and providing that "If and in so far as this act, or proceedings to enforce it, may deprive any person of rights existing under the Constitution," the owners of the land thus restricted may have their damages assessed by a jury, does not contain an adjudication that the public welfare requires that the landowners' property should be restricted without compensation to them, and, without such adjudication by the Legislature, the statute does not deprive the landowners of their rights to compensation for the taking of their right to build above seventy feet. Whether a clear expression by the Legislature of its intent to restrict these buildings in the exercise of its police power without compensation to the owners would infringe the Constitution, *quære*. *Parker v. Commonwealth*, 199.
5. St. 1898, c. 452, relating to the height of buildings on and near Copley Square in Boston, was held in 174 Mass. 476, to be a taking of rights in property for the benefit of the public who use Copley Square, the Legislature seeking thereby to promote the beauty and attractiveness of a public park in the capital of the Commonwealth. This was upon an averment in

the bill, that Copley Square "is an open square and a public park intended for the use, benefit and health of the public, and is surrounded by buildings devoted to religious, charitable and educational purposes, some of which contain books, manuscripts and works of art of great value." Now, *held*, that the facts agreed in the case fully sustain this averment. *Attorney General v. Williams*, 330.

6. St. 1872, c. 344, an act to supply the town of Newton with water, enlarged by St. 1889, c. 302, gave a landowner whose land was taken under the act three years within which to file a petition for the assessment of damages for the taking, and did not require that any formal notice of the taking should be given to him other than constructive notice by filing an instrument of taking in the registry of deeds. The taking of land under the act required concurrent action by the mayor and aldermen and common council of Newton after it became a city. *Held*, that the Legislature might assume that persons whose lands were taken under the act would have such knowledge on the subject of the taking, that the constructive notice by filing an instrument of taking in the registry of deeds would be all that was required to enable them to protect their rights within the three years allowed them for that purpose, and that the act is constitutional. *Appleton v. Newton*, 276.

No right to actual notice of taking by eminent domain, see EMINENT DOMAIN, 2.

Whether purpose of taking was sufficiently stated, see EMINENT DOMAIN, 3.

Police Power.

Whether an express exercise of police power in St. 1899, c. 457, limiting height of buildings near State House would have been constitutional, see *ante*, 4.

Assessments.

7. St. 1892, c. 418, § 8, amending St. 1891, c. 923, § 15, in regard to assessing upon adjoining parcels of land the cost of new highways laid out by an order of the board of street commissioners of Boston under those statutes, provides that the "assessable cost of the work done under said order shall be assessed upon the several parcels of land" and that the amount for which each parcel shall be liable shall be determined by the street commissioners "in accordance with the proportions in which said board shall determine that the said parcels of land are increased in value by the aforesaid order and the carrying out thereof." *Held*, that this section is unconstitutional, as under it the whole assessable cost is to be paid by the adjoining estates and this may be greater than the benefit to the property assessed. The provision for the proportional distribution of the tax among the different parcels does not prevent the total assessment from exceeding the total benefit. *Lorden v. Coffey*, 489.

Private Railroad on Highway.

8. The provision of Pub. Sts. c. 112, §§ 223, 224, permitting a person or corporation to construct a railroad upon a highway for private use in the

transportation of freight subject to the approval and regulation of the city or town wherein it is to be constructed, is constitutional. And where with the consent of the selectmen of a town a freight horse railroad was constructed by a quarry company under the sections above named, for the transportation of stone from the quarry of the company to a steam railroad about a mile distant for distribution to purchasers, it was *held*, that this was not a taking of the property of the owner of the fee of the highway. The transportation of its stone over the highway by the quarry company was done by it as one of the public under proper regulations by the selectmen, and it might be better for the condition of the road and more for the interest of the public that the stone should be carried over the road on iron rails, than that the surface should be rutted by the wheels of heavily loaded wagons. *White v. Blanchard Bros. Granite Co.* 363.

Remedial Statutes. Vested Rights.

9. The Legislature has a limited but not clearly defined power to pass laws affecting pending cases relieving just claims from defeat through mistake of procedure. *Danforth v. Groton Water Co.* 472.
10. St. 1900, c. 299, providing that "No petition now or hereafter pending in the superior court for the assessment by a jury of damages sustained by any person by reason of any taking of property in the exercise of the right of eminent domain shall be dismissed for want of jurisdiction in said court solely on the ground that no previous application for the assessment of such damages had been made to a board of county commissioners, or that no award thereof had previously been made by a board of county commissioners," is not unconstitutional as applying to petitions against a corporation pending in the Superior Court, which before the act would have been dismissed because the petitioners had not applied first to the county commissioners, and where by the terms of the respondent's charter, the time for filing a new petition had expired. The effect of the act in saving the petitioners from being barred by the limitation in the respondent's charter is only secondary and accidental, and what is done directly is to enact that parties already in court shall not be defeated for neglect of a useless form. *Ibid.*

Cruel or Unusual Punishments.

11. Whether the provision of the Massachusetts Declaration of Rights that "No magistrate or court of law shall . . . inflict cruel or unusual punishments" applies to punishments provided by statutory enactment, *also*, whether the prohibition extends to punishments which are unusual but not cruel, *quære*. *Storti v. Commonwealth*, 549.
12. St. 1898, c. 326, § 6, providing that the punishment of death shall be inflicted by causing a current of electricity to pass through the body of the convict, does not inflict a cruel or unusual punishment within the meaning of article 26 of the Massachusetts Declaration of Rights. The punishment is death; and the adoption of new means, for the purpose of producing death as swiftly and painlessly as possible, is not forbidden by

Constitutional Law (*continued*).

the Constitution, although the means adopted be the result of discoveries of recent science not previously known in Massachusetts. *Storti v. Commonwealth*, 549.

13. The provision of St. 1898, c. 326, § 3, leaving it to the warden of the State prison to select the day within the week appointed by the court on which a prisoner sentenced to death shall be executed, was not intended to aggravate the prisoner's distress by enhancing his suspense, and does not inflict a punishment. The purpose is humane, and the possible uncertainty for a brief period as to the exact time of execution is not a part of the punishment. *Ibid*.

Personal Rights of Prisoner after Sentence.

14. The provision of St. 1898, c. 326, § 2, that after delivery to the warden of the State prison of a convict sentenced to death, the prisoner shall be kept in a special cell and only certain persons allowed access to him without an order of court, does not and is not intended to prevent the presence of the prisoner in court in any matter which properly may be brought up in court and which by the course of law or treaty requires his presence. *Storti v. Commonwealth*, 549.

Constitution of United States.

15. St. 1898, c. 452, relating to the height of buildings on and near Copley Square in Boston, is not in violation of the Constitution of the United States as impairing the obligation of contracts, §§ 3 and 4 providing adequate compensation for all persons suffering damage under its provisions. *Attorney General v. Williams*, 330.

CONTRACT.

Parties.

Beneficiary of fraudulently surrendered life insurance policy has no right to have premiums paid by another on a substituted policy applied to surrendered policy, see INSURANCE, 4.

Validity.

1. An agreement that an attorney undertaking to prosecute a suit shall have a share of the thing recovered may not be champertous. In order to make it so, the bargain must contain the further element that the attorney's services shall not create a debt due to him from his client and that his prospective share shall be his only compensation. *Hadlock v. Brooks*, 425.
2. There may be circumstances under which an attorney lawfully may agree to give his services to prosecute a suit without charge if unsuccessful and that in case of success and not otherwise his fees shall constitute a debt due to him from his client for which the amount recovered in the suit or a part of it shall be security. *Ibid*.
3. One of two executors had been found by a jury to have induced the testator by fraud or undue influence to make a certain codicil, and these findings had been set aside and a new trial granted. Without the knowledge

of the court in which the probate of the codicil was pending, this executor personally made a contract to pay \$500 to one of the two next of kin of the testator in consideration of his withdrawing his opposition to the probate of the codicil. There was no evidence of fraud. *Held*, that this contract was enforceable and not contrary to public policy. *Seaman v. Colley*, 478.

4. A certificate of membership in a New York corporation, which made the terms and conditions printed on its back a part of the contract with the certificate holder, had printed on its back as one of the conditions a provision that "any action brought against this association by any shareholder shall be brought in the County of Ontario, State of New York." *Held*, that this condition should be enforced, and that an action on the contract contained in the certificate could not be maintained in Massachusetts. *Daley v. People's Building, etc. Assoc.* 13.

For contract to sell oats "by the bag" made valid by usage showing meaning of the term, see *SALE*, 1; *EVIDENCE*, 18.

Construction.

Of contract to furnish steam piping.

5. In a suit in equity to reform a contract to furnish steam piping for a building of five floors, it appeared that the plaintiff was invited to bid for the contract and to "Make price on piping without tanks and elevator pumps and with" and to "Make price on complete plant" and to "Make price on plant without heating system above the second floor." The plaintiff made a bid as follows: "For the whole building, \$3,719; for the building below the three top floors, \$2,854; and without the tanks and pump, \$2,260." The defendant then drew a form of offer, which the plaintiff signed, and also the defendant, as follows: "I propose to install in your new building a complete system of piping in accordance with the plans and specifications. The price for the above is \$2,260. I further agree to install all work above the second floor for the sum of \$965, this sum being deducted from the total cost for the whole building, if not done." The plaintiff sought to have this contract declared ambiguous, and to have it reformed in accordance with his construction of his original bid. *Held*, that the original bid was ambiguous and the contract as signed was not, but meant that the plaintiff would do the piping of the entire building for \$2,260, and would do it without the three upper floors for \$965 less, making the price for the piping of the two lower floors \$1,295. *Whitworth v. Lowell*, 43.

Of contract to build balconies.

6. The specifications of a building contract contained under the title "Iron Work" the following: "Provide and build in three ornamental balconies on front as shown, securely bolted to the wall, of the value of \$300." The contractor sought to recover the price of the above described balconies as extra work performed outside of his contract, and offered to show that it was agreed by both parties when his contract was made, that the balconies

Contract (*continued*).

should not be included in his estimate and that they were not included in the contract price, but that afterwards the owner changed his mind and ordered the balconies built. *Held*, that a ruling excluding this evidence was right, the offer of it being an attempt to vary the terms of a written contract by oral evidence. *Held, also*, that in a provision of the contract that the building was "to be completed according to the specifications and drawings (except such work as is reserved to be done by the owner) on or before" a certain day, the expression work "reserved to be done by the owner" meant work thus reserved by the specifications, and did not open the way to the introduction of oral evidence. *Norwood v. Lathrop*, 208.

Of building loan.

7. Upon a first mortgage to secure a building loan of \$20,000 a bank advanced \$15,000 and retained \$5,000 under an agreement with the mortgagor "until the said building shall be in such progress to completion that the mortgagee shall deem it safe to advance said balance." A second mortgagee acquired the equity in the property by foreclosure, and brought a bill to redeem from the first mortgage. The bank had paid out the whole of the \$5,000 retained by it upon orders from the mortgagor, leaving the amount of \$150 due to it for interest. It was contended by the second mortgagee that the bank ought to have applied the amount of \$150 to the payment of this interest from the \$5,000 retained by it, and could not require that sum to be paid by the second mortgagee in redeeming from the bank's mortgage. *Held*, that the bank was not bound thus to apply the money in its hands, that the \$5,000 was not additional security but was part of the sum lent, retained to ensure the completion of the building, and that the rule, requiring a prior encumbrancer with two securities first to resort to that on which the subsequent encumbrancer has no lien, did not apply. Whether the bank lawfully could have set off the sum of \$150 against the interest due it without the consent of the mortgagor, *quære*. *Tillinghast v. North End Savings Bank*, 458.

Of contract to publish portrait engraving.

8. In a suit to recover the contract price for a portrait engraving of the defendant made by the plaintiff, it appeared that the defendant signed the following order on a blank furnished by the plaintiff headed by a description of a proposed edition of Gould's History of Freemasonry: "Please to execute for me a steel plate engraving from photograph furnished of myself, for which I agree to pay to you or your order the sum of \$300 upon the delivery to me of fifteen India-proof impressions from the plate; and I authorize you to copyright, print and insert the number of impressions required in the Portrait Gallery and Biographical Volume of the above-named work." An advertisement of the plaintiff was put in evidence in which the defendant was named as one of "the brethren whose portraits have already been engraved or are being engraved to appear in Gould's History of Freemasonry." There was evidence that the plaintiff published a portrait engraving of the defendant in a book called "Portrait Gallery with Biographical Sketches of Prominent Freemasons

throughout the United States" making no reference to Gould's History of Freemasonry. *Held*, that the heading of the blank on which the order was signed was part of the instrument and could be used to show that the defendant gave his order to the plaintiff as publisher of Gould's History of Freemasonry; that the contract being ambiguous the above named advertisement was admissible as an act of the plaintiff tending to show its meaning; that the plaintiff's agreement was to publish the defendant's portrait in Gould's History of Freemasonry; and that in order to recover the contract price the plaintiff must show that the defendant accepted the publication of his portrait in the book published by the plaintiff in place of a publication in Gould's History of Freemasonry. *Yorston v. Brown*, 103.

Of agreement of compromise.

9. An agreement of compromise, made between the sole residuary legatee and executor under a contested will, of the first part, and the sole next of kin and certain family friends and servants of the testatrix claiming under former wills, of the second part, provided, that the will should be admitted to probate, and that the residue should be divided equally between the party of the first part and the parties of the second part, and that the party of the first part should "at the expiration of thirty days after the final allowance and probate of said will . . . convey, assign and transfer by proper instruments in writing . . . one half of all his interest in and to said estate, as residuary devisee and legatee under said will, to and among said parties of the second part to be held by them respectively in the same manner and in the same shares or proportions as the said one half of the said residue is hereinafter stipulated to be paid to them respectively." The provision for the distribution of half of the residue among the parties of the second part was on the basis that such one half would amount to \$30,000. Payments amounting to \$18,500 were to be made to the parties of the second part other than the next of kin, and the next of kin was to be paid \$13,500 "and also the excess of said one half said rest, residue and remainder over and above thirty thousand dollars." There was also the following provision: "If, however, said one half of said rest, residue and remainder shall not amount to thirty thousand dollars, then, and in that event, each and every payment hereinbefore to be made out of said one half, shall be abated *pro rata*." The will having been allowed in accordance with the agreement, the executor, party of the first part, two years and a half later filed his final account by which it appeared that one half the net residue was more than \$40,000, and that the property of the estate had increased in value more than \$10,000 since the allowance of the will. It appeared, however, that there had been no increase in value after the expiration of two years from the time of the executor's appointment. *Held*, that by the true construction of the agreement of compromise the next of kin was entitled to the balance of one half the net residue of the estate after paying to the other parties of the second part the sums specified in the agreement to be paid to them, that the purpose of the conveyance to be made by the residuary legatee thirty days

Contract (*continued*).

after the allowance of the will was to give to the parties of the second part one half of his interest as residuary legatee and the right to receive their respective shares thereof when the time for distribution should arrive, and that the executor was entitled to the ordinary period of two years in which to pay the debts and legacies and ascertain the residuum, and, the increase in the value of the property all having occurred within that time, the parties of the second part other than the next of kin had no interest in it, and that the provision in the agreement, that in case one half the net residue should turn out to be less than \$30,000 all the payments to the parties of the second part should abate ratably, did not affect the construction of the express provision, that in case one half turned out to be greater than \$30,000 the next of kin was to have "the excess." *Held, also*, that the parties of the second part other than the next of kin were not entitled to interest after the expiration of one year from the death of the testatrix on the sums to be paid to them under the agreement, since these sums were paid not as legacies but as part of the residue, and the money was not wrongfully detained. *Phelps v. Fitch*, 442.

For enforcement in equity of agreement to compromise, see EQUITY JURISDICTION, 1; EXECUTOR AND ADMINISTRATOR.

For construction of building contract, see *post*, 14.

For construction of policy of life insurance, see INSURANCE, 3.

For usage of trade to explain terms of contract, see EVIDENCE, 16.

When meaning of contract left to the jury because of ambiguity, see ORDER.

Construction of an order on administrator to pay on "final distribution," see ORDER.

Performance and Breach.

10. A provision in the by-laws of a beneficiary association, requiring a sworn certificate from a physician before sick benefits can be received by a member, creates a condition precedent to the association's liability, and such requirement is not satisfied by the production of an unsworn certificate of the member's attending physician which the physician refused to swear to from conscientious scruples against furnishing a sworn certificate. *Nolan v. Whitney*, 88 N. Y. 648, is not law in Massachusetts. *Audette v. L'Union St. Joseph*, 113.

11. In an action of contract for a failure to sell and deliver certain goods, it appeared, that the defendant had agreed to ship the goods on February 1, and on January 25 wrote to the plaintiff that he would not keep his contract. The plaintiff replied that he should hold him to his bargain, and on February 2 made a further demand for performance which was refused. *Held*, that there was no breach of the contract until February 1, and that the measure of damages was the difference between the contract price and the market price on that day and not between the contract price and the price on January 25 when the defendant announced his intention of breaking the contract. *P. P. Emory Manuf. Co. v. Salomon*, 582.

Whether claim founded on breach of contract by another before novation can be set off, see SET-OFF AND RECOUPMENT.

Rescission.

12. A holder of a certificate in an association requiring monthly payments from its members made default in a monthly payment due January 26. On July 11 following a notice was published to all stockholders "who are in default for six months or more in the payment of dues," to pay in sixty days under penalty of forfeiture. After the lapse of sixty days, the association, its directors having passed a vote of forfeiture, in good faith notified the certificate holder that his stock was forfeited. This was a mistake, the default not having existed six months before the notice. Thereupon the certificate holder sued the association to recover all sums paid by him under his certificate, on the ground that the association had repudiated its contract and the consideration for the payments had failed. *Held*, that the mistaken announcement to the certificate holder that his stock was forfeited was not a repudiation of the contract which gave him a right to rescind it, and that he could not maintain his action to recover back the consideration. *Daley v. People's Building, etc. Assoc.* 13.
13. A pretended forfeiture of membership falsely set up by a loan and saving corporation, as a reason for not complying with a demand for certain payments alleged by a shareholder of five years standing to be due to him under the terms of his certificate, does not justify such shareholder in rescinding his contract under which he has made monthly payments during the five years, and his only remedy is on the contract; and if the corporation was organized in another State and the certificate provides that any action brought by a shareholder against the corporation shall be brought in that State, there is no remedy here. *Corrigan v. People's Building, etc. Assoc.* 40.

Right of infant to disaffirm his contract, see *INFANT*.

Building Contracts.

14. A building contract contained a provision that "No alterations shall be made in the work shown or described by the drawings and specifications, except upon a written order of the owner, and when so made, the value of the work added or omitted shall be computed by the architect, and the amount so ascertained shall be added to or deducted from the contract price." *Held*, that the contractor could recover for extra work done upon oral orders of the agent of the owner given with the owner's consent and authority, the requirement of a written order being waived. *Norwood v. Lathrop*, 208.

That written specifications cannot be varied by oral evidence, see *ante*, 6.

For bill in equity to reform contract for steam piping, see *ante*, 5.

Implied Contract: Common Counts.

15. When a contractor agrees in writing to erect a building to the satisfaction of the agent of the owner of the land, and erects the building in substantial conformity with the contract but not to the satisfaction of the agent, he can recover on an account annexed the value added to the land

by his work and materials, and in many cases this value may be ascertained by deducting from the contract price the amount of diminution of the value of the building by reason of the contractor's deviations from the contract. *Norwood v. Lathrop*, 208.

To recover money on repudiation of condition of payment, see **ASSIGNMENT**, 4.

CONVERSION.

Of bonds induced by fraudulent representations, see **DECEIT**.

Evidence of value in action for conversion of bonds, see **EVIDENCE**, 7.

COPLEY SQUARE.

Character as a public park, see **CONSTITUTIONAL LAW**, 5.

Statute regulating height of buildings in, does not impair obligation of contracts, see **CONSTITUTIONAL LAW**, 15.

CORPORATION.

The subscribers for shares of a corporation that has voted to wind up its business and has transferred all its property to a new corporation formed for the purpose, who receive certificates for shares in the new corporation to the number subscribed for in the first corporation, continue to be stockholders of the first corporation and are not partners in relation thereto. *White v. New Bedford Cotton Waste Corp.* 20.

Liability of corporation maintaining electric wire for injuries from insufficient insulation, see **ELECTRIC WIRE**.

Franchise tax and local tax on property of corporation not complementary, see **TAX**, 10.

COSTS.

Defendant's right to costs after appeal by plaintiff who recovers no greater sum than below, see **PRACTICE, CIVIL**, 5.

Motion for additional costs on overruling motion for new trial, where made, see **PRACTICE, CIVIL**, 14.

COVENANT.

Whether joint or several.

1. A partnership of three was dissolved by mutual consent. Under the agreement of dissolution one of them purchased the stock on hand and continued the business. As part of the consideration he agreed to assume all debts and liabilities of the firm, and covenanted to hold the retiring partners harmless from loss on account thereof. Held, that a covenant of indemnity ran severally to each of the retiring partners. *Morgan v. Wardell*, 350.

Against Encumbrances.

2. A valid assessment for the laying out of a new street is a breach of the covenant against encumbrances in a deed given after the street was laid out but before it was constructed and the assessment made. *Lorden v. Coffey*, 469.

Construction of exception in covenant against encumbrances, see DEED, 1.

CUSTOM.

Of banks sending notes through clearing house for collection, see USAGE.

DAMAGES.

For Property taken under Statutory Authority.

1. In assessing damages for land taken by a town under a statute providing for the improvement of its water supply, although the damages are to be assessed as of the time of the taking, the owner may show the possibilities of the land for future use and the nature of such uses. *Fosgate v. Hudson*, 225.
2. Where no land is taken, neither St. 1890, c. 428, to promote the abolition of grade crossings, nor Pub. Sts. c. 49, §§ 18, 68, 69, in regard to damages from the laying out, alteration or discontinuance of highways, provides for the payment of any damages not special and peculiar. *Davenport v. Dedham*, 382.
3. Under St. 1896, c. 257, requiring the alteration of certain grade crossings in Hyde Park and Dedham, a petitioner cannot recover damages due to the fact that a change of grade has made passage over the street to and from his estate less convenient than it was before, although his ownership and occupation of land on the street make it necessary for him to use the street more frequently than the general public, since such damage does not differ in kind, although it may in degree, from the damage sustained by that portion of the public generally who may have occasion to use the street. *Ibid.*
4. A petitioner seeking to recover damages alleged to have been suffered by him from a change of grade in a street made under St. 1896, c. 257, requiring the alteration of certain grade crossings in Hyde Park and Dedham, cannot testify what effect, if any, the change of grade had upon the view from his house, if his land was too far away to make it a practical question. Nor can he claim damages on the ground that the change of grade made it impossible to haul as heavy loads over the street as before, such damage not being special and peculiar. The petitioner could have described the amount of the increased flow of surface water upon his land and the damage if any caused thereby, in case such increased flow of water had existed. *Davenport v. Hyde Park*, 385.
5. Under St. 1890, c. 428, § 5, amended by St. 1891, c. 123, to promote the abolition of grade crossings, in assessing the damages sustained by a peti-

Damages (*continued*).

- tioner in the remaining portion of a coal and lumber yard, a part of which had been taken under the act, such yard having upon it at the time of the taking spur tracks connected with the railroad, a ruling is right, that regard should be had to the premises as they were on the date of the decree changing the grade of the crossing, taking into consideration, as affecting the market value of the property, the railroad facilities as they then existed, but with the possibility of the discontinuance of the spur tracks by the railroad company. *New York, etc. Railroad v. Blacker*, 386.
6. Under St. 1890, c. 428, § 5, amended by St. 1891, c. 123, to promote the abolition of grade crossings, consequential damages cannot be recovered. This construction is enforced by the language of the act "All damages sustained by any person in his property," but the principle is a general one not dependent on the exact phraseology. In this case, the damages excluded as consequential were the cost of moving the contents of a building cut off by the taking, waste in handling coal which had to be moved and loss from necessary interruption to business. *Ibid.* Consequential damages not recoverable by a lessee for the taking of the premises for south terminal station in Boston, see EMINENT DOMAIN, 5.
7. The provision for a petition for damages in § 5 of St. 1875, c. 185, creating the board of park commissioners of Boston, applies only to cases where property is taken under the right of eminent domain and is no defence to an action of tort against the city of Boston for injury to a dock caused by water-logged portions of an old wharf removed by the board of park commissioners being allowed to drift into and sink in the plaintiff's dock. *Fiske Wharf & Warehouse Co. v. Boston*, 526.
8. Under St. 1888, c. 131, giving the town of Brookline authority to take additional water from Charles River, that town established waterworks upon the division line between the counties of Norfolk and Suffolk. St. 1872, c. 343, § 6, incorporated by reference in the above named act, gave to persons sustaining damages under the act the right to apply for an assessment thereof by petition to the Superior Court in the county in which the dams or other works occasioning such damages were situated. Petitions to the Superior Court under this section by owners of water powers and mill privileges upon the Charles River were filed simultaneously in both counties, and orders of notice thereon were served on the town, those on the petitions in Norfolk County being issued and served nine days before those on the petitions in Suffolk County. The petitioners then filed in each county motions for the appointment of commissioners to assess their damages under the section above named. On motion of the town, the Superior Court ordered the petitions in Suffolk County to be dismissed on the town's filing an admission that it was liable in Norfolk County, if at all. *Held*, that the order dismissing the petitions in Suffolk County was erroneous, as the petitioners had the right to elect in which county to proceed, that they had not done so merely by taking out the orders of notice upon their petitions in Norfolk County first, and that the court by its action had in effect given the respondent the election which belonged to the petitioners. *Semble*, however, that the damages occasioned by taking water under St. 1888, c. 131, cannot be divided into those

caused by the part of the town's waterworks in Norfolk County and those caused by the other part of the same works in Suffolk County, but that the whole damage must be assessed under one petition, in one county or the other at the election of the petitioners. *Etna Mills v. Brookline*, 482.

Damages when land previously taken is subjected to new use, see EMINENT DOMAIN, 1.

Right of tenant to damages incident to taking leased property, see EMINENT DOMAIN, 5, 6; LANDLORD AND TENANT, 1.

Evidence of value of land and water rights taken, see EVIDENCE, 10.

In Contract.

Measure of damages after notice of intended breach of contract to deliver goods, see CONTRACT, 11.

In Tort.

A statutory provision giving damages for property taken by eminent domain does not preclude an action of tort for other damages resulting from negligence of officers appointed under the statute, see *ante*, 7.

Liability for damages for consequences that ought to have been foreseen, see SALE, 4, 5.

DECEIT.

In an action for the conversion of bonds found by the jury to have been obtained from the plaintiff by fraudulent representations of the defendant that the spirit of the plaintiff's deceased husband through the defendant as a medium directed the plaintiff to deliver the bonds to the defendant, the defendant cannot take the ground, that the deception was so obvious that the plaintiff, who found it out after many years, ought to have found it out before and therefore cannot rely on having been deceived by it. *Dean v. Ross*, 397.

DEDHAM.

All territory of, at time of act establishing metropolitan park commission included in Metropolitan Parks District, see METROPOLITAN PARKS DISTRICT, 1.

DEED.

Words of Inheritance.

1. A deed granting a right to flow adjoining land of the grantor without words of inheritance gives only an estate for life, which is not enlarged by covenants of warranty in the deed to the grantee and his heirs. And a subsequent deed of the adjoining land to another with a covenant against encumbrances excepting the flowage rights of the first grantee, then living, does not except more than was granted. *Temple v. Morse*, 336.

Construction.

2. A deed to a railroad company conveyed certain lots of land on a street called Regent Street. Another deed of the same and other grantors con-

veyed to the same company other lots on the same street. The express descriptions excluded Regent Street. The first deed then contained this clause "Also intending to convey to the grantee all my rights in said Regent Street above mentioned." The second deed contained the clause "Also intending to convey to the grantee all our rights in said Regent Street." The grantors owned many other lots on Regent Street, which was over twenty-seven hundred feet in length. Subsequently a portion of Regent Street adjoining these other lots was discontinued as a highway and taken by the railroad company for the purposes of its road. *Held*, that the deeds above described conveyed the fee of the grantors only in those parts of Regent Street adjoining the lots conveyed to the railroad company and not in those parts of it adjoining the lots retained by the grantors, and that the owners were entitled to any damages they could prove for the taking of their property for railroad purposes. *Bullard v. New York, etc. Railroad*, 570.

Covenant in deed against encumbrances is broken by a valid assessment for new street, see COVENANT, 2.

For decision that lease for one hundred years does not by virtue of Pub. Sts. c. 121, § 1, pass a fee, see LANDLORD AND TENANT, 1, 2.

Construction of clause in deed reserving water power, see WATERCOURSE, 2.

DEVISE AND LEGACY.

1. A will contained the following provision: "I give and bequeath to my beloved wife E. G. the interest at four per cent of two thousand dollars during her natural life, at her decease to be paid to my daughter F. W." The testator's wife survived him and died four months later. *Held*, that the wife's estate was entitled to receive the interest of \$2,000 at four per cent from the death of the testator, that the intention of the testator was to create an annuity of \$80 a year, and the wife's executors were entitled under Pub. Sts. c. 136, §§ 24, 25, to a part proportional to the time that she lived. *Woods v. Gilson*, 511.
2. A will contained the following provision: "I give and bequeath to my daughter L. D. wife of W. D. the interest at five per cent of two thousand dollars during her natural life also one thousand dollars to be paid to her as her necessities may demand at her decease said amount to be equally divided among her children then living." *Held*, that the testator's daughter L. D. was entitled to an annuity of \$100 a year during her life, and, in addition, that the sum of \$1,000 was to be paid her from time to time as her necessities might require, that the last named sum was to be held in trust by the executor who was made trustee under the will, and that he was to judge of the necessities, subject to the rule that his discretion should be exercised fairly. Whether the words "said amount" in the gift over to the children of L. D. apply to the \$2,000 or only to such part of the sum of \$1,000 as may remain at the death of L. D., will not be considered under a bill for instructions until the contingency occurs. *Ibid*.
3. A will contained the following provision: "I give bequeath and devise to my daughter F. W. wife of A. W. my home place and my meadow lot

bought of J. P. after paying the legacy given in article second of this will to my daughter L. D. and also the interest to be paid to my wife mentioned in article first in this will." The testator had nine children. Other clauses of the will gave specific bequests and legacies to his sons and daughters, and the residue of his estate was to be equally divided between one of his sons and his daughter F. W. named above. The legacies provided by the second and first articles were life annuities respectively of \$100 and \$80 a year. The assets of the estate were more than sufficient to pay these legacies without resorting to the real estate named. *Held*, that the annuities were charges upon the home place and meadow lot devised to F. W. who was to take these parcels "after paying" these legacies. *Woods v. Gilson*, 511.

4. A testator left to his wife "the interest at four per cent of two thousand dollars during her natural life at her decease to be paid to my daughter F. W." By another clause of his will he gave his daughter F. W. a certain parcel of land charged with the payment of the above named annuity to his wife. The wife survived him and died. *Held*, that F. W. was not entitled to anything under the first bequest, except to have her land exonerated from the charge imposed upon it in favor of the testator's widow, on paying the money found due to the widow's estate. *Ibid*.
5. A testator gave to his daughter M. S. a mortgage and note on a certain farm, called the Fletcher Farm, for \$2,500 and by another clause of his will gave the use and income of the Fletcher Farm above the mortgage given to his daughter, to his son, J. G. for life, with remainder to his children living at his decease. This mortgage and note were executed by the testator eight years before his death. The daughter was named in the mortgage as mortgagee and the note was payable to her. The testator after executing these papers had left them in the custody of a justice of the peace who drew them. Later he visited the justice and caused to be written upon the note the words "No interest to be paid until after my decease." After the testator's death the note and mortgage were found in the possession of the justice. He gave them to the executor who delivered them to M. S. who had the mortgage recorded, knowing the facts above stated. *Held*, that the note and mortgage were not enforceable because without consideration and not delivered in the lifetime of the testator, but that the testator's bequest of his own invalid note was in effect a pecuniary legacy of the amount of the note, and that this amount was a charge upon the Fletcher Farm; therefore, that J. G. took the farm for life with remainder to his children, subject to a charge of the payment of \$2,500 to M. S. *Ibid*.
6. The will of a married woman contained the following devise: "All my estate both real and personal, of which I may die seized and possessed, or to which I may be entitled at my decease, I give, devise and bequeath to my husband A. B., to have and hold the same to him for and during his natural life; with full power and authority to sell and dispose of any and every portion thereof, whenever in his judgment he may deem it conducive to his comfort." Then followed the provision "At the decease of my said husband, all the residue of my said estate, that shall not be sold or dis-

posed of by my said husband during his lifetime, I give, devise and bequeath as follows:" The property was then left to two sisters of the testatrix during their joint lives and, on the death of the survivor, in fee to a person named. *Held*, that the husband took an estate for life with a power to sell and dispose of any part of it during his lifetime when he deemed such disposition conducive to his comfort, that the words "sell and dispose" meant a disposition by sale and not by gift, and that the "comfort" referred to was the personal if not wholly physical comfort of the husband himself and not such comfort as he might feel in giving the property to others, that the power was confined to sales for a valuable consideration to be made only when the husband in good faith deemed such consideration conducive to his comfort by supplying his present or prospective needs, and that a conveyance by him, purporting to be made in execution of the power, for a fictitious consideration to the mother of his second wife, her only child, in order that his children by his second wife might inherit the property, was not a valid execution of the power. *Stocker v. Foster*, 591.

No interest on sums paid from the residue of an estate under an agreement of compromise, see *CONTRACT*, 9.

Burden of proving divesting of vested rights under, see *EVIDENCE*, 1.

Evidence to show good faith in execution of power, see *EVIDENCE*, 5.

DISCRETION OF COURT.

In matters generally within the discretion of a presiding judge, his discretion is not unlimited, and he is not at liberty to disregard the rules of law by which the rights of the parties are governed. Thus the improper exclusion of an X-ray photograph will sustain an exception. *De Forge v. New York, etc. Railroad*, 59.

As to the admission of photographs, see *EVIDENCE*, 12.

For discretionary power of commissioners appointed by Legislature to act under supervision of court, see *METROPOLITAN PARKS DISTRICT*, 2.

DISSEISIN.

1. A deed from a tenant holding a lease for one hundred years with a right of perpetual renewal containing words of grant and inheritance with a covenant that the grantor is "lawfully seised in leasehold of the granted premises and that they are free from all encumbrances except a ground rent of three hundred dollars per annum," does not disseise the lessor, but should be construed as a conveyance of the interest under the demise rather than as one wrongful and paramount to it. *Stark v. Mansfield*, 76.
2. Successive grantors may transfer their possession of a strip of land successively and continuously occupied as part of the granted premises but not included in the description in any of the deeds, and by such continuity of possession for twenty years a title by limitation may be acquired. *Sawyer v. Kendall*, 10 Cush. 241, distinguished, and dicta in earlier cases

founded on *Potts v. Gilbert*, 3 Wash. C. C. 475, disapproved. *Wishart v. McKnight*, 356.

3. Where a grantor transfers to his grantee possession of a strip of land which he has occupied without title, adjoining, enclosed with and used as a part of the lot described in the deed, the possession of the grantor should be added to that of his grantee in computing the twenty years in which a title to the strip may be acquired by limitation. Following *Wishart v. McKnight*, *ante*, 356. *Jordan v. Riley*, 524.
4. One is not less a disseisor or prevented from acquiring a title by lapse of time because his occupation of a strip of land is under the belief that it is embraced in his deed. *Ibid*.

DISTRICT COURT.

Extension of time for appeal and for filing appeal bond, see PRACTICE, CIVIL, 3, 4.

Postponement of formal entry of judgment, see PRACTICE, CIVIL, 4.

EASEMENT.

Public easement in way does not embrace use for steam railroad, see EMINENT DOMAIN, 1.

ELECTIONS.

Use of machines in voting, see CONSTITUTIONAL LAW, 2, 3.

ELECTRIC LIGHT COMPANY.

Liability for injuries from insufficient insulation of an electric wire in violation of statute regulating wires, see ELECTRIC WIRE; NEGLIGENCE, 23.

ELECTRIC WIRE.

Whether a violation of the provisions of St. 1890, c. 404, § 1, by insufficient insulation of an electric wire at the point of attachment to its support, gives a person injured by such wire a right of action by virtue of the statute, *quære*. *Barker v. Boston Electric Light Co.* 503.

Duty towards employee of another using pole in common with defendant, see NEGLIGENCE, 23.

EMINENT DOMAIN.

1. If land which has been taken for a highway is subsequently taken by a railroad company for the purposes of its road, the highway being discontinued, the new use to which the land is subjected may be more onerous to the landowner than the former one, and he is entitled to recover damages, if he can prove them. *Bullard v. New York, etc. Railroad*, 570.
2. A taking of land for a public use is strictly a proceeding *in rem*. In all such cases it is enough if there is such a notice as makes it reasonably certain that all persons interested who easily can be reached will have

Eminent Domain (continued).

- information of the proceedings, and that there is such a probability as reasonably can be provided for, that those at a distance also will be informed. It is for the Legislature to say, what means of knowledge will be enough to affect the landowner with notice. *Appleton v. Newton*, 276.
3. In a taking of land by a city for the purposes of its water-supply under statutory authority, if the statutes giving the authority are correctly referred to in stating the purposes of the taking, a further reference to other statutes not applicable does not invalidate the taking; and, without naming the statutes, a statement that the land is taken "for the purpose of the water supply for said city of Newton and an additional water supply therefor" is a sufficiently definite statement of the purposes of the taking. *Ibid.*
 4. Where a town, under a statute providing for the enlargement and improvement of its water supply, took certain land described and also took "all the water, water rights and water supply, flowing to or from the premises," this was held to include a brook which lay partly within the land taken and which flowed within the land into another brook. *Fosgate v. Hudson*, 225.
 5. St. 1896, c. 516, providing for taking land for a south terminal station in Boston, by § 24 gave the owner of land taken thereunder three months after the filing of a location to vacate his premises. *Held*, that the tenant of such an owner, whose lease expired twenty-five days after the three months allowed for removal, could not recover damages for interruption of his business by reason of having to move, or for the expenses of removing his property to a new place of business; and for loss of tenant fixtures he could recover at any rate no more than the damage caused by his having to leave on the earlier day instead of at the expiration of his lease. *Emery v. Boston Terminal Co.* 172.
 6. In a suit by a lessee for damages from the taking of the leased premises by right of eminent domain, the petitioner attempted to set up an oral extension of his lease. *Held*, that the respondent could take advantage of Pub. Sta. c. 120, § 3, without pleading it, it being incumbent on the petitioner to prove a good title, and if the petitioner's claim for damages depended wholly on the oral lease, the petition if it stated the facts would be demurrable. *Ibid.*

Right of landowner to compensation for restrictions on use of land, see CONSTITUTIONAL LAW, 4.

Whether an express exercise of the police power in St. 1899, c. 457, limiting the height of buildings near the State House would have been constitutional, see CONSTITUTIONAL LAW, 4.

What is a public use, see CONSTITUTIONAL LAW, 5.

Sufficiency of notice of taking, see CONSTITUTIONAL LAW, 6.

Assessment for laying out way must not exceed benefit, see CONSTITUTIONAL LAW, 7.

As to damages for abolition of grade crossing and change in grade, see DAMAGES, 2-6.

No consequential damages for abolition of grade crossing, see DAMAGES, 6.

Statute creating Boston Park Commission provides damages only for property taken, see DAMAGES, 7.

Procedure for assessing damages for taking water rights, see DAMAGES, 8.

Right of lessor of a term of one hundred years to have damages assessed for taking of leased property, see LANDLORD AND TENANT, 1.

Constructing private freight railroad on highway not a taking of a new easement, see WAY, 5; CONSTITUTIONAL LAW, 8.

EMPLOYERS' LIABILITY ACT.

See NEGLIGENCE, 9-23.

EQUITY JURISDICTION.

To enjoin Action at Law.

1. It is not a legal defence to an action on an alleged claim, that the plaintiff has signed an entry of judgment satisfied for a sum less than his claim and also a release of all claims recited to be in consideration of the payment of the lesser sum, and has subsequently refused to receive the lesser sum or to deliver the instruments, and if these facts constitute an equitable defence, that does not deprive a court of equity of its jurisdiction to enjoin the prosecution of the action at law and to order the defendant to deliver the instruments of discharge to the plaintiff. *Cook v. Richardson*, 125.
2. A bill in equity may be maintained by one who has attached certain property, to enjoin a non-resident holder of a prior attachment on the same property from proceeding further with his action, on the ground that his debt has been paid since he began it; and the order or decree addressed to the defendant restraining the further prosecution of the action may be served on his attorney therein, jurisdiction over the defendant having been obtained by service of the subpoena on such attorney. *Moors v. Ladenburg*, 272.

To decree Foreclosure of Mortgage.

3. There is jurisdiction in equity in this Commonwealth to decree a foreclosure of a mortgage and to order a sale of mortgaged property, where the mortgage creates a trust with elaborate provisions for the protection of the rights of the parties in case of a breach of condition, and the property conveyed includes nearly all the property of the mortgagor consisting of real estate in two counties and a variety of articles of personal property on the mortgagor's premises in each of the two counties. *Old Colony Trust Co. v. Great White Spirit Co.* 92.

To restrain Enforcement of Prior Mortgage.

4. A title company employed by a savings bank to examine the title to a certain lot of land and to draw the papers for a mortgage upon it, did so, and represented that the title was clear and unencumbered, and in reliance on this representation the bank made the loan, the title company drawing

Equity Jurisdiction (*continued*).

the mortgage. There was a prior mortgage which was held by the title company, the existence of which without intent to deceive it negligently failed to disclose. Subsequently the savings bank foreclosed its mortgage, and the receivers of the bank conveyed the land by a quitclaim deed to a purchaser, who had notice of the existence of the prior mortgage in the hands of the title company. In a suit in equity brought by such purchaser against the title company, to restrain it from enforcing its prior mortgage, it was *held*, that the bill could be maintained, as the title company owed the savings bank the duty of using due care, to ascertain and report all encumbrances on the land, and, by its negligence having failed to do so, was estopped from setting up its prior mortgage. *Held, also*, that the fact that the plaintiff was a grantee under a quitclaim deed having full knowledge of the facts did not prevent him from enforcing the estoppel; that the savings bank had the election of suing the title company in tort for negligence or of bringing a suit in equity founded on the defendant's estoppel, to enjoin it from setting up the encumbrance, and, having elected to rely on the estoppel, could pass the right to a purchaser, who could enforce it in his own name. *Nickerson v. Massachusetts Title Ins. Co.* 308.

To restrain Sale of Article imitating Unpatented Article.

5. In a suit in equity brought to restrain the defendant from selling zithers made in imitation of the plaintiff's, which were of a certain form and arrangement unpatented but intended for the use of patented music of which the plaintiff owned the patent, it was *held*, that the defendant might lawfully sell zithers deliberately copied from the plaintiff's if he did not represent them to be of the plaintiff's make, and that the only relief to which the plaintiff was entitled was to have the defendant ordered plainly to mark the zithers sold by him so as to indicate unmistakably that they were of the defendant's make and not the plaintiff's. *Flagg Manuf. Co. v. Holway*, 83.

To relieve against Fraud.

6. A false representation made with fraudulent intent by A. to B., a woman, that A., the speaker, was a man of large means and credit and had superior facilities for raising money, and that he could raise it on easier terms than B. could, and that if he had her land he could at once get a certain sum of money upon a mortgage of it, whereby B. was induced to convey to A. her land, which in consequence was sold on an execution against A., is not such a fraud as to afford a ground for equitable relief, in a bill brought by B. against the purchaser of the land at the execution sale. *People's Savings Bank v. James*, 322.

For bill in equity to reform contract, see CONTRACT, 5.

For plea of *res judicata* to bill in equity, see RES JUDICATA.

Right in equity to redeem from tax sale, see TAX, 8.

To enjoin interference with water rights of mill owner and enjoin diversion of water, see WATERCOURSE, 2, 3.

To decree specific performance of agreement to compromise, see **EXECUTOR AND ADMINISTRATOR**, also *ante*, 1.

Bill for instructions not maintainable until contingency has arisen, see **DEVISE AND LEGACY**, 2.

EQUITY PLEADING AND PRACTICE.

Amendment: Substitution of Plaintiff.

1. In a suit in equity brought by a receiver of a corporation, this court held that the bill should have been brought in the name of the corporation and ordered that, upon the substitution of the corporation as plaintiff in place of the receiver, the case should stand for hearing as to the nature and extent of the relief to be granted. The bill having been amended in accordance with this order, the defendant asked leave to amend his answer by setting up the statute of limitations, it being more than six years since the cause of action accrued although that period had not expired when the bill by the receiver was filed. *Held*, that after the substitution of the corporation as plaintiff the suit continued to be the same that was begun by the receiver and the defendant could not set up the statute. *East Tennessee Land Co. v. Leeson*, 206.

Parties.

2. St. 1898, c. 452, relating to the height of buildings on and near Copley Square in Boston, provided that all damages suffered by reason of the provisions of the act should be paid by the city of Boston. *Held*, that the city of Boston was not a necessary nor a proper party to an information by the Attorney General to compel the removal of the portion of a certain building exceeding the limit imposed by the act, not being entitled to be heard on the question of whether the defendant was violating the law. The fact that the defendant must resort to the city for his damages, and in a suit to recover them may raise some of the questions heard and determined in this suit, is not a sufficient reason for making the city a party to litigation in which its interests are only collateral. *Attorney General v. Williams*, 330.

For proper parties to bill to redeem from tax sale, see **TAX**, 7.

Multifariousness.

3. A bill to redeem land from a tax sale was amended by adding a prayer that the tax deed should be declared void and the defendant ordered to execute a release to the plaintiff. *Held*, on demurrer, that the bill was not multifarious by reason of the inconsistent nature of the relief sought, the case being one, not where different causes of action were joined, but where alternative forms of relief were prayed for in respect to one and the same cause of action. *Downey v. Lancy*, 465.

Revivor.

Of suit to redeem from tax sale, see **ACTION, SURVIVAL**; **TAX**, 9.

On Appeal: Findings of Trial Judge.

4. On an appeal from a decree of the Superior Court in equity, it appeared that the evidence was taken by a commissioner appointed at the request of both parties under Equity Rule 35 of that court. The judge at the request of the appellant under St. 1883, c. 223, § 7, reported the facts found by him. *Held*, that this court must consider not only the findings of the judge but also the evidence reported under Rule 35, upon which his decree was made, although the court would not reverse the decree unless clearly wrong and would accept as true the findings of fact reported unless clearly wrong. *Allen v. French*, 539.

Master's Report.

5. Objections to a master's report not perfected as exceptions in accordance with Chancery Rule 32 of the Superior Court are not open for consideration. *Whitworth v. Lowell*, 43.
6. Chancery Rule 32 of the Superior Court provides that exceptions to the report of a master shall be filed with the clerk and notice thereof given to the adverse party, and that in every case the exceptions shall briefly and clearly specify the matter excepted to, and the cause thereof. This rule is not complied with by filing objections to a master's report and to findings of the master and requests for findings and rulings, and then alleging that the objecting party excepts to so much of the master's report as is inconsistent with his objections and his requests for findings and rulings which are appended to the master's report. *Ibid*.

Objection of Adequate Remedy at Law.

7. The objection to a bill in equity that the plaintiff has a plain, adequate and complete remedy at law not set up in the defendant's answer cannot be taken for the first time in this court. *Whiting v. Burkhardt*, 535.

Order or decree may be served on attorney of non-resident defendant, see EQUITY JURISDICTION, 2.

For plea of *res judicata* to bill in equity, see RES JUDICATA.

Computation of time for redemption from tax sale in case of revivor of original bill, see TAX, 9.

ESTOPPEL, IN PAIS.

1. An act or representation in order to create an estoppel or constitute a waiver must have been known and relied upon by the person seeking to set it up. *Weatherbee v. New York Life Ins. Co.* 575.
2. One who has a clear title by estoppel can convey his rights to any one, and the knowledge or ignorance of the purchaser is immaterial. *Nickerson v. Massachusetts Title Ins. Co.* 308.
3. One employed as an attorney to draw an instrument cannot take advantage of a claim founded on a statement surreptitiously inserted by him in the instrument to the prejudice of his employer, which is true

in fact but which he is estopped by his former conduct from setting up. *Nickerson v. Massachusetts Title Ins. Co.* 308.

4. If, in a suit to establish a mechanic's lien as against a mortgagee from A., it appears that A. had only an instantaneous seisin of the land on which the lien is claimed, yet if it also appears that A. falsely represented to the petitioner that he was the owner of the land and thereby induced the petitioner to enter into the contract under which his lien is claimed, and the mortgagee when he took his mortgage knew of the petitioner's claim of lien and also of the false representation and inducement, whether the mortgagee as well as A. would not be estopped to deny A.'s ownership of the land, *quære*. *Sprague v. Brown*, 220.

For acts estopping title company from setting up prior mortgage, see EQUITY JURISDICTION, 4.

EVIDENCE.

Presumptions and Burden of Proof.

1. On the trial of a writ of entry, it appeared, that the tenant claimed under a deed purporting to be made by A. B., in execution of a power under a will, and that the will left the property in question to A. B. for life with a power of disposing of it during his lifetime for certain purposes, and gave the remainder after intervening life estates to the demandant. *Held*, that the burden was upon the tenant to show a valid exercise of the power, because the remainder vested in the demandant upon the death of the testator and remained thus vested unless divested by a valid execution of the power. *Stocker v. Foster*, 591.
2. In maintaining a defence of payment to a suit by a collector of taxes for a tax, it was shown that the defendant paid the amount of the tax to the town treasurer who until recently had been authorized by the collector to receive such payments. *Held*, that the burden of proof was on the defendant to show that the authority remained unrevoked at the time of the payment, or that he paid in good faith relying on the previous existence of the authority and believing that it remained unrevoked, although, had there been no evidence of revocation, the defendant, to meet the requirement of proof on his part, could have relied on a presumption that the conditions remained unchanged. *Whitaker v. Ballard*, 584.

Burden is on defendant to prove defence of champerty, see CHAMPERTY.

For sufficiency of attestation of foreign judgment, see JUDGMENT, 2.

Relevancy and Materiality.

To show negligence of superintendent.

3. In an action for injuries caused by the caving in of the side of a trench in which the plaintiff was working, where the negligence of the defendant's superintendent is in issue, the fact that the superintendent's attention was called to the danger of the trench and the need of shoring it, may be shown by evidence of statements made to him by a third person; and where the person making the statements worked in the same trench earlier on the same day, he may be allowed to state what precautions he took for

Evidence (*continued*).

his own safety, this having a bearing on the dangerous character of the trench, and also being admissible to rebut any inference prejudicial to his testimony that might be drawn from his conduct in going into the trench to work. *Bartolomeo v. McKnight*, 242.

To show good faith.

4. In a suit by a collector of taxes for a tax, the defence relied upon was that the defendant paid the tax to the town treasurer who until recently had been authorized by the collector to receive such payments. The plaintiff was permitted to put in evidence the record of a former suit by the plaintiff against the defendant brought before the defendant made the payment to the treasurer, with evidence that the defendant knew that he could get that suit dismissed for insufficient service. *Held*, that the record of the former suit was competent in connection with other testimony, on the question whether the defendant paid in good faith believing that the treasurer was authorized to receive payment of the tax for the collector. *Whitaker v. Ballard*, 584.
5. The will of a married woman gave all her property to her husband for life, with a power of selling and disposing of it during his lifetime "when-ever in his judgment he may deem it conducive to his comfort." Upon the issue whether a deed to the mother of the husband's second wife purporting to be made in execution of this power was given for a valuable consideration and whether the grantor in good faith deemed the proceeds conducive to his comfort, it was *held*, that evidence of the pecuniary condition and circumstances of the grantor at the time he gave the deed were material, and that it might be shown that he had retired from business and had a competency and was a man of means with a substantial property. *Stocker v. Foster*, 591.

To show residence.

6. In a suit to redeem land in Boston from a tax sale brought by the purchaser of the land at a foreclosure sale, it was *held*, that upon the issue whether the owner, a married woman, was a non-resident when the tax sale was advertised, evidence, that the owner's husband was taxed in that year as a resident of Revere and was not assessed in Boston, was not admissible, as the suit was between third parties neither of whom claimed through the person taxed, and also because the evidence would not have been admissible against the husband himself. *Downey v. Lancy*, 465.

To show value.

7. In an action for the conversion of fifteen bonds of a certain company, evidence that the plaintiff paid par for three of the bonds and that the other twelve were of the same issue is sufficient to warrant the jury in finding that all of the bonds were worth par. *Dean v. Ross*, 397.

To show making of a certain contract at a certain time.

8. Upon the issue whether a contract to do certain work for a price named was made at the time alleged, an expert cannot be asked what in his opin-

ion would be a fair price or value for the work, that having nothing to do with the question. *Reid v. Berry*, 260.

To show notice of intended use of article ordered.

9. Where it was material to show, that the maker of a certain boiler was notified that it was to be used for experiments in a certain patented process to be conducted by the patentee, it was *held*, that the letters patent could be introduced in evidence as a foundation for testimony of the patentee that he told the boiler maker of the use for which the boiler was wanted. *Boston Woven Hose, etc. Co. v. Kendall*, 232.

To show damages for land taken.

10. In a suit for the assessment of damages for the taking of the petitioner's land and water rights by a town under a statute providing for the enlargement and improvement of its water supply, the petitioner sought to recover for injury to his pasture by the taking of the water of two brooks crossing it used by him for watering his cattle. It appeared that previously a pond adjoining the petitioner's pasture had been taken by the town as a water supply, reserving to the owners of the petitioner's land the right for their cattle to come to the pond to drink "and to otherwise enjoy the use of said pond in so far as the same shall not pollute or contaminate the purity of the water therein or unreasonably interfere with the use and enjoyment thereof by the town . . . as a reservoir to supply the inhabitants of said town with pure water." It further appeared that, with the waters of the brooks diverted, the pond was the only place at the pasture where the petitioner's cattle could be watered. *Held*, that the petitioner could ask witnesses, qualified as experts, whether in case the petitioner's cows going to the pond to drink should pollute the water and in consequence should be excluded altogether from the pond as a drinking place, the taking of the waters of the brooks would not be a serious injury to his pasture. *Fosgate v. Hudson*, 225.

To show damages resulting from change of grade of street, see DAMAGES, 4.
Evidence of an intention on the part of both landlord and tenant to continue their relations indefinitely on the same terms, and expert testimony as to an increase in value from that source, are not competent to show value, see LANDLORD AND TENANT, 4.

Best and Secondary.

11. X-ray pictures may be admitted in evidence if properly taken. *De Forge v. New York, etc. Railroad*, 59.
12. In an action to recover for personal injuries consisting of a fracture of the bones of the plaintiff's left foot, the plaintiff put in evidence X-ray pictures of the plaintiff's feet printed from a glass plate, on which the feet were designated in pencil as "left" and "right" respectively, on the assumption that the true left and right were reversed in the printed pictures. A witness for the plaintiff testified that there was an enlargement of the bone of the foot marked "left" in the pictures which was the result of fracture,

Evidence (continued).

and on cross-examination said that, leaving the picture out, there was nothing to disclose to the eye any fracture. The defendant then offered in evidence the glass plate from which the pictures introduced by the plaintiff had been printed and pictures printed from it by an X-ray expert, and offered to show that the X-ray process placed the right foot on the right side of the plate and the left foot on the left side of the plate, and that in printing from it the objects would be reversed and the true right and left would appear; and that the foot marked "left" in the plaintiff's pictures, which his witness had testified showed an enlargement of the bone, was really the right foot which was not injured. This evidence as well as the glass plate and pictures offered by the defendant were excluded. *Held*, that the plate and pictures and the explanatory evidence should have been admitted. *Held, also*, that the fact, which appeared, that the glass plate had on it the letters R and L which had been placed there since the pictures put in evidence by the plaintiff had been printed, was no reason for excluding the plate, as these letters did not in any way obscure the portion of the left foot in controversy, and were no more objectionable than the words added in pencil to the plaintiff's pictures. *Held, also*, that the exclusion of the plate and pictures was not within the discretion of the presiding judge, there being no question of verification. *De Forge v. New York, etc. Railroad*, 59.

13. Upon the issue whether a certain way is a public way the records of the county commissioners dealing with the way as a highway or town way are admissible in evidence. *Nickerson v. New York, etc. Railroad*, 195.

Identity of Voice through Telephone.

14. Conversations over a telephone otherwise admissible may be admitted in evidence, where the witness testifies that he recognized the voice of the person with whom he was talking. *Lord Electric Co. v. Morrill*, 304.

Parol and Extrinsic Evidence affecting Writings.

15. In an action by an indorsee of a promissory note against the maker, the defendant undertook to show that the note was without consideration as between the maker and the payee and that the plaintiff took it from the payee after maturity. The payee and indorser of the note who was a brother of the maker appeared as a witness for the defendant. In the course of his cross-examination the plaintiff's counsel produced a paper and asked the witness "And on the same date you signed the paper of which that is a copy?" The answer was "I don't know. I can't say," and the paper was not offered in evidence. The plaintiff's counsel was then permitted, against the defendant's objection, to ask the following question: "Did n't you go to the Bank of England with Mr. Kekewich or some representative of that firm and Mr. Leland, and there do what was said to be necessary in order to transfer to Mr. Leland all that you had in the Bank of England in the way of money and accounts and notes and papers?" The witness replied "I signed something in the Bank of England." Mr. Leland was the treasurer of the plaintiff, a corporation. *Held*, that

the question related to the character of a certain transaction and not to the contents of a written instrument, and that if the answer meant that the witness did not sign anything conveying the note, then the question and answer did no harm, whereas if the answer was an implied admission that he did sign a paper necessary to convey the note, then the answer was admissible not as tending to show the contents of a written instrument, but as tending to affect the credibility of the witness's previous statement, that the note was always under his control as long as it remained in the Bank of England. *Boston Rubber Shoe Co. v. Gordon*, 520.

16. In an action for the price of oats sold "by the bag," evidence is admissible of a usage of trade by which the term "bag of oats" means sixty-four pounds of oats, not including the bag, or two bushels of oats of thirty-two pounds each. *Eldridge v. McDermott*, 256.

To explain terms of ambiguous written contract, see CONTRACT, 8.

Not admissible to vary terms of written building contract, see CONTRACT, 6.

Admissions and Confessions.

17. Declarations made by a person afterwards appointed administrator of an estate are not admissible after his appointment as admissions against the estate. *Hadlock v. Brooks*, 425.

As to admission implied from answer on cross-examination, see *ante*, 15.

Privileged Communications.

18. An attorney at law to whom one of his clients had made a general assignment for the benefit of creditors on March 30th was asked as a witness whether the assignor had not stated to him during the latter part of March that he did not own certain real estate levied upon. This was objected to as calling for a privileged communication between attorney and client. *Held*, that it did not appear that the parties were acting at the time in the relation of attorney and client, as this statement might have been made on March 31st to give information to the assignee in regard to the property covered by the assignment. *Hoar v. Tilden*, 157.

Collateral Issues : Remoteness.

19. In an action by a woman passenger to recover for injuries received in falling to the ground while attempting to alight from an overcrowded street car of the defendant, it was *held*, that evidence that another woman immediately preceding the plaintiff in alighting from the car had her jacket torn as she was pushing her way through the crowd, rightly could be excluded as evidence involving collateral issues and too remote. *Jacobs v. West End Street Railway*, 116.
20. Upon the issue whether a certain explosion was caused by the defective construction of the hinge of the door of a boiler which prevented such door from being screwed tightly enough against the packing, *semble*, that it may be competent to show that experiments two or three months later with a similar boiler, and with all conditions similar except the hinge, did not result in an explosion. *Boston Woven Hose, etc. Co. v. Kendall*, 232.

Evidence (continued).

Declarations of Deceased Persons.

21. St. 1898, c. 535, in regard to the admission as evidence of declarations of deceased persons formerly excluded as hearsay, is applicable to civil cases in which the cause of action accrued before its passage. *Stocker v. Foster*, 591.
22. St. 1898, c. 535, provides, that "No declaration of a deceased person shall be excluded as evidence on the ground of its being hearsay if it appears to the satisfaction of the judge to have been made in good faith before the beginning of the suit and upon the personal knowledge of the declarant." *Held*, that under this statute a statement of a deceased grantor in disparagement of his grant, made in the absence of the grantee, may be admitted against the grantee, although it would not have been admissible if the grantor had been alive at the time of the trial. The statement in this case was material to show the intent with which the grantor executed the deed, and if alive he could have testified as to his intent. *Ibid*.

Evidence of Intention.

Declarations of deceased grantor material to show intention with which deed was executed, see *ante*, 22.

Language accompanying part payment admissible to show the intent with which it was made, see LIMITATIONS, STATUTE OF, 2.

Discretion of Court.

As to the admission of an X-ray photograph, see DISCRETION OF COURT.

Weight and Sufficiency.

Of evidence to show intent to keep liquors for unlawful sale, see INTOXICATING LIQUORS.

Scope of cross-examination, see WITNESS.

EXCEPTIONS.

See PRACTICE, CIVIL, 8-11.

EXECUTION.

1. In this Commonwealth execution can be levied on real and personal property contemporaneously. Whether the levies properly can be made by different officers, *quære*. *Hoar v. Tilden*, 157.
2. A deputy sheriff seized on execution chattels of a debtor. The next day the debtor made a voluntary assignment for the benefit of creditors. A month later a judge of the Court of Insolvency appointed an assignee in insolvency of the debtor and executed an assignment to him of all the debtor's property; whereupon the assignee under the voluntary assignment surrendered to the assignee in insolvency all the property of the debtor which had come to his hands and all his rights under the first assignment. Between the times of the two assignments the deputy sheriff by

agreement with the debtor permitted certain of the chattels he had seized on execution to be delivered to customers of the debtor and paid for on delivery, and then seized on execution the money paid by the customers. In an action by the assignee in insolvency against the deputy sheriff for conversion, it was *held*, that the levy on the money was good against the plaintiff, although the defendant's permitting the chattels to be turned into money might have defeated the original seizure of the chattels as against the assignee under the voluntary assignment, since the plaintiff's title rested on the assignment from the judge of the Court of Insolvency and did not date from the previous voluntary assignment which had been superseded and abandoned. *Hoar v. Tilden*, 157.

EXECUTOR AND ADMINISTRATOR.

The estate of an intestate amounted to about \$5,000. All claims against the estate except one disputed claim amounted to about \$700. On the disputed claim a suit was brought for about \$15,000. The administrator represented the estate insolvent, and the Court of Insolvency on his petition made a decree ordering a proof of claims under Pub. Stg. c. 137. Thereafter the administrator by a compromise settled the suit on the disputed claim for \$200, thereby making the estate solvent. *Held*, that the administrator had power to make the compromise, and that this power was not taken away by the apparent insolvency of the estate and order of the court for proof of claims, and that the assets of the estate having proved sufficient to pay all claims, it became the duty of the administrator under Pub. Sts. c. 137, § 22, to pay all claims in full; and he was given a decree against the other party to the compromise ordering its enforcement. *Cook v. Richardson*, 125.

As to validity of agreement between executor and one of the next of kin to withdraw opposition to probate of codicil, see **CONTRACT**, 3.

Statements before appointment as administrator not admissions against the estate, see **EVIDENCE**, 17.

Administrator bound personally by acceptance of order, see **ORDER**.

Construction of order on administrator to pay on final distribution, see **ORDER**.

FLOWAGE.

Construction of deed granting flowage rights, see **DEED**, 1; **WATERCOURSE**, 2.

FRATERNAL BENEFICIARY ASSOCIATION.

1. Under St. 1888, c. 429, § 8, which is not changed by subsequent amendments as to the words in question, a mortuary benefit on the death of a member of a fraternal beneficiary corporation may be payable to the "children, relatives of, or persons dependent upon such member." *Held*, that an illegitimate infant daughter of a deceased member not supported by him during his lifetime, who was designated by him as his beneficiary,

Fraternal Beneficiary Association (continued).

could not take as such beneficiary, not being a child or relative of or person dependent upon such member within the meaning of the statute. *Lavigne v. Ligue des Patriotes*, 25.

2. Under the provision of St. 1894, c. 367, § 8, that where the wife, children, father, mother, brothers and sisters of a member of a fraternal beneficiary corporation have all died, his certificate may be transferred to "any other person," the member may designate a stranger as the beneficiary, and such designation will not be rendered void by the fact that it was made upon an agreement that the beneficiary should pay the dues and assessments of the member. The provision of the section above named that "No contract under this section shall be valid or legal which shall be conditional upon an agreement or understanding that the beneficiary shall pay the dues and assessments, or either of them" applies only to the original making of the contract, and not to the subsequent transfer of a certificate originally valid. Whether the prohibition applies to a case where the benefit society is not a party to the agreement or understanding that the dues are to be paid by the beneficiary instead of the member, *quære*. *Hill v. American Legion of Honor*, 145.
3. A fraternal beneficiary corporation had the following by-law: "In the event of the death of all the beneficiaries selected by the member before the decease of such member, if no other or further disposition thereof be made in accordance with the provisions of these by-laws, the benefit shall be paid to the widow and children of the member in equal shares; if none, then to the heirs of the deceased member, and if no person or persons shall be entitled to receive such benefit it shall revert to the Benefit Fund." *Held*, that where a member died without widow, children or heirs at law, and the corporation waived the claim of reversion to its benefit fund, the executor of the deceased member might be admitted as a party to a suit on the certificate, in order to enable him to raise the question whether there was a resulting trust. *Ibid*.

Requirement of sworn certificate of physician made a condition precedent to claim of sick benefits, see *CONTRACT*, 10.

FRAUD.

Transfer fraudulent as against creditors, see *BANKRUPTCY ACT*, 1.

No defence that the deception was obvious, see *DECEIT*.

In concealing cause of action, see *LIMITATIONS, STATUTE OF*, 4.

FRAUDS, STATUTE OF.

Oral lease not made valid by subsequent memorandum, see *LANDLORD AND TENANT*, 3.

GAMING.

Trading stamps without element of chance not prohibited by St. 1898, c. 576, see *TRADING STAMPS*.

GRADE CROSSING.

Damages resulting from abolition of or change in, see DAMAGES, 2-8.

Jurisdiction of Superior Court under grade crossing act, see SUPERIOR COURT.

INFANT.

An infant does not lose his right to disaffirm a contract because he cannot put the other party to the contract *in statu quo*. *White v. New Bedford Cotton Waste Corp.* 20.

INSOLVENCY.

1. If any part of a sale or conveyance is fraudulent as an unlawful preference, the whole is void. *Hill v. Marston*, 285.
2. A promise in general terms to give security out of one's property, is merely a personal undertaking having no application to specific property, and does not prevent a subsequent conveyance in pursuance of such promise, made in contemplation of insolvency, from being an unlawful preference. *Ibid*.

When assignee's title vests in case of appointment of assignee after a voluntary assignment, see EXECUTION, 2.

For cases under bankruptcy act, see BANKRUPTCY ACT.

INSOLVENT ESTATES OF DECEASED PERSONS.

Right of administrator to make compromise which renders estate solvent, see EXECUTOR AND ADMINISTRATOR.

INSURANCE.

Fire.

1. The Massachusetts standard form of fire insurance policy provides, that the policy shall be void if assigned without the assent of the company in writing or print. Such a policy was taken out by a mortgagor and made payable to the mortgagee "as his interest may appear." The mortgagee assigned the mortgage and also without the assent or knowledge of the insurance company assigned to the assignee of the mortgage all his "right and interest" in the policy. *Held*, that this was not a transfer of the policy within the above prohibition, but merely an assignment of the right to receive the proceeds as security for the mortgage debt. *Whiting v. Burkhardt*, 535.
2. The Massachusetts standard form of fire insurance policy, prescribed by St. 1894, c. 522, § 60, contains the following provision: "If this policy shall be made payable to a mortgagee of the insured real estate, no act or default of any person other than such mortgagee or his agents, or those claiming under him, shall affect such mortgagee's right to recover in case of loss on such real estate." It also provides, that the policy shall be

Insurance (*continued*).

void if the property is sold without the assent of the company in writing or print. A standard policy on mortgaged real estate was made payable to the mortgagee in case of loss. Without the assent or knowledge of the company, one of the two mortgagors who took out the policy conveyed his interest in the mortgaged property and his interest was also sold on execution. *Held*, that this conveyance and sale did not affect the right of the mortgagee to recover on the policy. *Whiting v. Burkhardt*, 535.

Assignment by mortgage of right to proceeds of insurance policy, see ASSIGNMENT, 1.

Life.

3. Payment of the premiums on the life insurance policy of another gives the person so paying them no interest in the policy, as the payments are presumed to have been made in behalf of the insured. *Lewis v. Metropolitan Life Ins. Co.* 52.

4. A married woman took out an insurance policy on the life of her husband and, after paying premiums on it for several years, gave it to her husband for safe keeping. He without the consent or knowledge of his wife surrendered the policy, and took out in exchange a new policy payable to his legal representatives. This policy he assigned and the assignee paid the premiums on it until the death of the assured. The widow, then first learning of the new policy, sued on the original policy issued to her, contending that it was still in force and that the payments of premiums on the new policy were applicable to the old one. *Held*, that the first policy was forfeited for non-payment of premiums, the payments on the new policy having been made upon a contract to which the plaintiff was a stranger. Whether the plaintiff was entitled to recover the surrender value allowed by the terms of the policy, *quære*. *Weatherbee v. New York Life Ins. Co.* 575.

5. A provision in a life insurance policy, that upon proof of death of the insured the company may pay the amount due under the policy to any relative by blood or connection by marriage of the insured or to any other person appearing to be equitably entitled to such payment by reason of having incurred expense on behalf of the insured or for his or her burial, does not enable a person of one of the classes described to sue on the policy, and such suit can only be maintained by the executor or administrator of the insured. *Lewis v. Metropolitan Life Ins. Co.* 52.

As to fraternal beneficiary associations, see FRATERNAL BENEFICIARY ASSOCIATION.

INTEREST.

No interest on sums paid out of residue under compromise of contested will, see CONTRACT, 9.

INTOXICATING LIQUORS.

At the trial on a complaint for keeping intoxicating liquors with intent unlawfully to sell the same, it appeared that the defendant was a retail drug-

gist licensed as a pharmacist and also holding a liquor license of the sixth class authorizing him to sell intoxicating liquors for medicinal, mechanical and chemical purposes not to be drunk on the premises. Officers, entering the defendant's premises on a Sunday, found a number of men in a back room connected with the defendant's drug store, several of them having bottles of beer in their hands, and in a closet of the same room which was unlocked by the defendant were found a washtub containing a large piece of ice and in the water surrounding it twenty-seven bottles of beer, and in a refrigerator eighteen more bottles of beer, and there were in all in the closet about fifty-one gallons of beer in four hundred and ten bottles and two hundred and sixty empty beer bottles, one and a half gallons of whiskey in three jugs and thirty gallons of whiskey in a barrel, one quart of wine, two gallons of rum, one gallon of gin, and one pint of sherry, also on top of one of the barrels a tumbler and a glass. *Held*, that there was sufficient evidence to warrant the jury in finding that the defendant kept intoxicating liquors with intent unlawfully to sell the same. *Commonwealth v. Tate*, 121.

JUDGMENT.

When a Bar.

1. If a plaintiff discontinues an action against one of two defendants and by mistake of remedy proceeds unsuccessfully against the wrong defendant, this is no bar to a subsequent action against the other. *White v. New Bedford Cotton Waste Corp.* 20.

Attestation of Foreign Judgment.

2. In an action on a judgment rendered in another State, the plaintiff offered in evidence a document purporting to be a copy of the record of the court that rendered the judgment, the attestation of which was signed "A. B. Clerk District Court, by C. D., Deputy Clerk." It was also signed by the judge of the court, who certified that A. B. was the clerk of the court and keeper of the records and seal thereof at the time of attestation, and that the certificate was in A. B.'s handwriting and that the attestation was in due form and made by the proper officers. *Held*, that the attestation did not comply with the requirements of U. S. Rev. Sts. § 905, because the certificate was not signed by the clerk; and that this defect was not cured by the certificate of the judge that the attestation was made by the proper officers, as all he could certify to under the statute was that the attestation was in due form. *Held, also*, that the attestation was not good under Pub. Sts. c. 169, § 67, as it did not appear that the deputy clerk who signed the certificate was the officer having charge of the records of such court. *Willock v. Wilson*, 68.

District court may postpone formal entry of judgment, see PRACTICE, CIVIL, 4.

Objections open on arrest of judgment, see PRACTICE, CIVIL, 6.

Where decree in equity is a bar, see RES JUDICATA.

JURISDICTION.

State court has jurisdiction of action by seaman to recover statutory compensation in case of wrongful discharge, see **SEAMAN**.

JURY.

For a presiding judge to state his recollection of the evidence is not charging the jury with respect to matters of fact, see **PRACTICE, CIVIL, 7**.

Power of judge to take case from jury, see **PRACTICE, CIVIL, 15**.

LANDLORD AND TENANT.

What Constitutes the Relation.

1. A lease of land for one hundred years without words of inheritance, reserving rent payable semiannually, with a perpetual right of renewal in the tenant at the end of each hundred years on condition that the rent payable on such renewals shall be equal to a certain percentage of the value of the land and never less than that named in the lease, reserves to the lessor an estate in fee; and if the land is taken for a railway station, under an act providing for the assessment of damages in accordance with the laws of the Commonwealth relating to the taking of land for railroad purposes, the lessor on application to the Probate Court under Pub. Sts. c. 49, § 19, is entitled to have a trustee appointed to receive the sum awarded and hold and administer it under the provisions of § 18 of the same chapter. The existence of a sublease of a part of the term and of a mortgage by the tenant of his interest does not make it necessary for the lessor to apply for an apportionment of damages under § 22 of the same chapter. *Stark v. Mansfield*, 76.
2. Pub. Sts. c. 121, § 1, providing that "When land is demised for the term of one hundred years or more, the term shall, so long as fifty years thereof remain unexpired, be regarded as an estate in fee simple as to everything concerning the descent and devise thereof" and for certain other purposes, and further providing that "whoever holds as lessee or assignee under such a lease shall, so long as fifty years of the term are unexpired, be regarded as a freeholder for all purposes," does not give the lessee a fee nor deprive the lessor of his reversion. *Ibid.*

Oral Lease: Subsequent Memorandum.

3. It would seem, that under Pub. Sts. c. 120, § 3, an oral lease cannot be made good even between the parties by a subsequent memorandum written after the lessor has parted with his title, but, however that may be, such a memorandum can have no effect as against a stranger who acquired an independent title to the land before the memorandum was made. *Emery v. Boston Terminal Co.* 172.

Rights and Liabilities inter sese.

4. The fact, that a lessor had been in the habit of renewing a tenant's lease whenever it expired and that both landlord and tenant intended to con-

tinue their relations on the same terms indefinitely, gives the tenant no property in the nature of an English customary tenant right. Even if such intention added to the saleable value of his lease, the addition would represent a speculation on a chance and not a legal right, and expert testimony as to an increase in value from that source is incompetent. *Baltimore v. Rice*, 73 Md. 307, cannot be followed under our statutes. *Emery v. Boston Terminal Co.* 172.

5. In the absence of warranty or misrepresentation a landlord is liable to his tenant only for a failure to disclose hidden defects the actual existence of which was known to him. *O'Malley v. Twenty-Five Associates*, 555.
6. The owner of a tenement house, maintaining it as such, is not liable to one of the tenants, or a person having his rights, for an injury caused by the breaking of a hook attached to a crane on the building, if he did not know that the hook was defective. *Ibid.*

Liability of Landlord to Third Persons.

7. Whether the employee of a coal dealer, who is injured by the breaking of a hook attached to a crane on a tenement house when hoisting a basket of coal for delivery to one of the tenants; has the same rights against the landlord that the tenant would have, *quære*. *O'Malley v. Twenty-Five Associates*, 555.

Right of tenant to damages incident to taking leased property, see EMINENT DOMAIN, 5.

Lessee under oral lease cannot recover damages for taking leased property by eminent domain, see EMINENT DOMAIN, 6.

Deed with words of grant and inheritance from a lessee of a hundred years term but made subject to the lease works no disseisin, see DISSEISIN, 1.

LIMITATIONS, STATUTE OF.

Part Payment.

1. Discussion by HAMMOND, J., of the law and authorities as to the character of the acknowledgment, promise or part payment required to take an action of contract out of the operation of the statute of limitations. *Gillingham v. Brown*, 417.
2. Under Pub. Sts. c. 197, § 15, providing, that an acknowledgment or promise, in order to take an action of contract out of the operation of the statute of limitations, must be "made or contained by or in some writing signed by the party chargeable thereby," and § 16 of the same chapter providing, that "nothing contained in the preceding section shall alter, take away, or lessen the effect of a payment of principal or interest made by any person," a part payment may be proved by oral evidence and the language accompanying the payment is admissible to show the intent with which it was made. *Ibid.*
3. In an action on a promissory note, where a part payment by the defendant is relied upon to take the case out of the statute of limitations, if it

Limitations, Statute of (*continued*).

appears that after the period of limitation had expired the defendant made an oral promise to pay the note in monthly instalments of \$10 each, and that he paid \$5 under this agreement, the only promise that can be inferred from such payment is a promise to pay by instalments, and the plaintiff can recover only the instalments due at the date of his writ. *Gillingham v. Brown*, 417.

Fraudulent Concealment of Cause of Action.

4. In an action for the conversion of bonds, there was evidence, that the defendant falsely represented to the plaintiff that the spirit of the plaintiff's deceased husband spoke to her through the defendant as a medium, telling her to give the bonds to the defendant; that the plaintiff believed the representation and relying on it gave the bonds to the defendant; and that the deception was successfully kept up until a year before the action was brought, although some of the bonds had been delivered more than six years before the date of the writ. *Held*, that this evidence would warrant a jury in finding that there was a fraudulent concealment of the cause of action under Pub. Sts. c. 197, § 14, and that the plaintiff could bring her action at any time within six years after she discovered that she had been duped. A defendant, who has fraudulently brought the plaintiff under such a delusion, cannot set up that the plaintiff had means of ascertaining the truth. *Dean v. Ross*, 397.

Running of statutory period required for title by limitation not interrupted by transfer of possession by disseisor, see DISSEISIN, 2, 3.

Right to set up, after amendment of bill or declaration, see EQUITY PLEADING AND PRACTICE, 1.

LOTTERY.

Trading stamps without element of chance not prohibited by St. 1898, c. 576, see TRADING STAMPS.

LOWELL.

Scope of authority of department of supplies, see MUNICIPAL CORPORATIONS, 2, 3.

MALICIOUS PROSECUTION.

An action for maliciously causing the arrest of the plaintiff, in a civil suit alleged to be groundless, is prematurely brought if the suit thus maliciously begun has not terminated. Otherwise, in an action for the malicious use of legal process in a suit founded on a just claim. *Wilson v. Hale*, 111.

MASTER AND SERVANT.

What Constitutes Relation.

1. Directions by a contractor for the construction of a building, to a subcontractor, who has agreed to do the brick work, to hurry up the work and

to make certain changes not required by the sub-contract, do not create the relation of master and servant, such directions being incident to the relation of contractor and contractee. *Eldred v. Mackie*, 1.

Scope of Employment.

2. It is not within the scope of the authority of a servant who has charge of property of his master, to inflict personal chastisement upon a person who has injured that property, in order to prevent repetition of the injury. *Brown v. Boston Ice Co.* 108.
3. The driver of an ice cart, who strikes a small boy on the head with the handle of an axe, for the purpose of punishing him for breaking the axe, which was the property of the driver's employer and which he had left on the sidewalk while going into a house to deliver ice, is not acting within the scope of his employment in making the assault, and the boy cannot recover from the driver's employer for injuries caused thereby. *Ibid.*
4. A driver of a public carriage is not acting within the scope of his employment, who, when ordered to drive to the stable his day's work being done, turns out of his course and drives some distance in an opposite direction in order to visit a saloon to get a drink, and there leaves his horses unattended, and his employer is not liable to a traveller on the highway injured by reason of the horses running away on account of the driver thus leaving them. *McCarthy v. Timmins*, 378.

Liability of proprietor of place of amusement for acts of special police officer, see SPECIAL POLICE OFFICER.

Employers' Liability, see NEGLIGENCE, 9-28.

MASTER'S REPORT.

Exceptions to, under Chancery Rule 32 of the Superior Court, see EQUITY PLEADING AND PRACTICE, 5, 6.

MECHANIC'S LIEN.

What furnished in Erection of a Building.

1. Asbestos and magnesia covering placed around steam piping in a distillery, intended as a permanent covering for the metal, may be found to be furnished in the erection of a building within the meaning of Pub. Sta. c. 191, § 1, in regard to mechanics' liens. *Angier v. Bay State Distilling Co.* 163.
2. A mechanic's lien may be established for labor performed in making, under an entire contract for a round sum, the apparatus and appliances for a brewery, to be inserted in the building and connected together by pipes, although part of the labor was performed in the petitioner's shop in another city, and the final connecting of the various appliances by pipes in the brewery may have been done by persons other than the petitioner. *Scannell v. Hub Brewing Co.* 288.

Mechanic's Lien (continued).

3. There may be a mechanic's lien under Pub. Sts. c. 191, § 1, for grading which is reasonably necessary for the proper construction and occupation of a house. *Reid v. Berry*, 260.

Entire Contract.

4. When a round price is to be paid for labor and materials, for a part of which the law gives a lien and for another part of which there can be no lien, and there is no way of determining how much is of one kind and how much of the other, no lien can be enforced. *Angier v. Bay State Distilling Co.* 163.
5. In a suit to enforce a mechanic's lien for labor and materials furnished for a building standing on two lots, the petition described only the front lot and the portion of the building standing thereon. The back lot did not belong to the respondent who made the contract under which the lien was claimed. The contract provided for the payment of a gross sum for certain labor and materials to be furnished for the whole building without distinguishing between the part of the building described in the petition and the part on the back lot. Certain other labor and materials were to be paid for by the piece, but there was no way of determining what proportion of the piece work was done on one part of the building and what on the other. *Held*, that on these facts no lien could be established. *Batchelder v. Hutchinson*, 161 Mass. 462, distinguished. *Ibid.*

Waiver.

6. A petitioner under Pub. Sts. c. 191, in regard to mechanics' liens, does not waive his lien by bringing an action at law for his debt and attaching the real estate against which he is seeking to enforce his lien. *Angier v. Bay State Distilling Co.* 163.

To whom a Debt is due.

7. One who has contracted with a landowner to furnish for a round sum labor and materials in the erection of a building, and has given to a third person an order to receive the payments under his contract, which has been accepted by the landowner, does not cease to have a debt due him from the landowner which entitles him to establish a mechanic's lien, since the money earned is due to him who performed the labor and furnished the materials, although he has ordered it paid to another. *Williams v. Weinbaum*, 238.

Amendment of Petition. Inaccuracy not Wilful.

8. One who files a petition to enforce a mechanic's lien, under an entire contract to perform and furnish certain labor and materials for a round sum, on which a payment on account has been made, and who in his petition credits one half of the payment upon the sum due to him for labor and the other half upon the sum due for materials, may be allowed to amend his petition by crediting the whole amount of the payment upon the sum due for materials and claiming the whole amount due to him for labor without

deduction, the statement in his petition being a narration which can be corrected, and not an offer or an appropriation. The petitioner's understatement of his claim for labor, subsequently corrected, comes within the provision of § 8 of Pub. Sts. c. 191, that the validity of the lien shall not be affected by an inaccuracy, not wilful, in stating the amount due for labor or materials. *Scannell v. Hub Brewing Co.* 288.

Time for filing Intervening Petition.

9. Pub. Sts. c. 191, § 9, requires a suit to enforce a mechanic's lien to be begun within ninety days after the petitioner has ceased to labor on or furnish labor or materials for the building. A. filed within the required ninety days a petition to enforce a lien. B. did the same. A. after the expiration of the ninety days filed an intervening petition in the suit of B. Later B. discontinued his petition. *Held*, that A. had not lost his lien by failing to file his intervening petition within ninety days from the time he had ceased to labor, and could enforce his lien under his intervening petition in the suit begun by B. *Angier v. Bay State Distilling Co.* 163.

Owner of land who has falsely stated his title and a mortgagee with notice estopped to deny title as against petitioner to establish lien, see *ESTOPPEL*, 4.

What constitutes instantaneous seisin and how ascertained, see *SEISIN*, 1, 2.

METROPOLITAN PARKS DISTRICT.

What included in.

1. St. 1893, c. 407, establishing a metropolitan park commission provided in § 3 that "The jurisdiction and powers of said board shall extend to and may be exercised in" certain cities and towns named "which cities and towns shall constitute the Metropolitan Parks District." Dedham was one of the towns named. By St. 1897, c. 226, all territory within the town of Dedham southwesterly of a certain line was incorporated as the town of Westwood. Section 5 of the last named act provided that the town of Westwood should assume and pay its just and equitable proportion of any debt due or owed by the town of Dedham at the time of the passage of the act "including its proportion of any obligation on the part of the town of Dedham for the expenses of the metropolitan parks and the metropolitan sewers, until a new apportionment is made concerning the same." Upon a motion by the Attorney General for the acceptance of the award of commissioners appointed under St. 1899, c. 419, to determine the proportion in which the cities and towns of the Metropolitan Parks District should pay money into the treasury of the Commonwealth, annually, until the next award five years later, there was a counter motion by the town of Westwood that the petition might be dismissed as to that town, on the ground that it was not liable to such assessment, being no longer part of the town of Dedham. *Held*, that the Metropolitan Parks District was territorial, and the setting off of Westwood as a new town

Metropolitan Parks District (continued).

did not take it out of the district or exonerate it from future charges, and that the words "until a new apportionment is made concerning the same" above quoted mean that when a new apportionment is made Westwood will be included, and not that its liability will then cease. *De las Casas, petitioner*, 213.

Powers of Apportionment Commissioners.

2. The discretion given to commissioners appointed under St. 1899, c. 419, to determine the proportions to be paid by cities and towns within the Metropolitan Parks District for the next five years, is not wholly arbitrary, but is to be exercised under the supervision and subject to the sanction of the court, and the commissioners should report the grounds of their determination so far as to enable the court to see that no constitutional rights have been impaired and that there has been no error of law in their award. It is not sufficient for the commissioners to report percentages and to certify that they deem them just and equitable. *De las Casas, petitioner*, 213.

METROPOLITAN WATER SUPPLY ACT.

Section 14 of the Metropolitan Water Supply Act, St. 1895, c. 488, provides that, if persons suffering injury in an established business on land in West Boylston cannot agree with the water board as to the amount of damages to be paid to them, "such damages shall be determined and paid in the manner hereinbefore provided." *Held*, that the "manner hereinbefore provided" is a petition to the Supreme Judicial Court for a commission under the previous provisions of the same section and not a petition to the Superior Court for assessment of damages by a jury under the provisions of the preceding section. *Sawyer v. Metropolitan Water Board*, 267.

MORTGAGE.

Of Real Estate.

Defect in exercise of power of sale.

1. An advertisement of a sale of land under a power of sale in a mortgage described four lots which originally had been included in the mortgage but the most valuable of which had been released therefrom on payment of three fifths of the mortgage debt. The mortgagee's attorney who published the advertisement did not know of the release. At the time of the sale the released lot had a house upon it worth more than the amount of the original mortgage debt. The other lots which remained subject to the mortgage were vacant. The mortgage provided that in case of default the mortgagee might "sell the granted premises or such portion thereof as may remain subject to this mortgage in case of any partial release hereof." The sale took place at the time advertised. The mortgagee's attorney having discovered his mistake, the auctioneer just before the sale announced to those present that the lot with the house on it had

been released, and proceeded to sell the three vacant lots. *Held*, that the sale was not a valid execution of the power given by the mortgage, as the real estate advertised was substantially different from what the mortgagee sold or had a right to sell. *People's Savings Bank v. Wunderlich*, 453.

For mortgagee's right to recover on insurance policy, see **INSURANCE**, 2.

Assignment by mortgagee of right to receive proceeds of insurance policy, see **ASSIGNMENT**, 1; **INSURANCE**, 1.

Jurisdiction in equity to foreclose mortgage, see **EQUITY JURISDICTION**, 3.

Right of mortgagee to redeem from tax sale not lost by foreclosure, see **TAX**, 5.

Obligation of mortgagee under building loan contract and his relation to junior encumbrancer, see **CONTRACT**, 7.

Of Chattels.

2. A bill of sale of chattels recorded as such, taken as security for a debt but not recorded as a mortgage, gives no title without delivery of the chattels. *Hill v. Marston*, 285.

MUNICIPAL CORPORATIONS.

Officers and Agents.

1. The almoner of Chicopee is not a judicial officer. *Attorney General v. Trehy*, 186.
2. Under St. 1896, c. 415, amending the charter of the city of Lowell, the chief of the department of supplies elected by the voters of the city under § 3 of that act has authority to employ as many subordinates as the business of his department may seem to him to require, provided he does not exceed the appropriation made for his department by the city council. *Muldoon v. Lowell*, 134.
3. Section 3 of St. 1896, c. 415, creating a department of supplies under the amended charter of the city of Lowell, provides that all material and supplies shall be purchased by the chief or head of that department, subject to the approval of the mayor, and that all bills for material and supplies shall state among other things the quality and quantity of articles purchased and received. *Held*, that the inspection of supplies is within the scope of the department, and that the chief of the department has authority to appoint an inspector whose duties are to inspect any goods furnished under a contract made by the chief of the department, and to see that the goods purchased are delivered and correspond in quality and quantity with the contract. *Ibid.*

Liability of city of Boston for damages in tort for acts of park commissioners, see **DAMAGES**, 7.

Procedure in assessing damages against the town of Brookline for water rights taken under private act, see **DAMAGES**, 8.

Liability for defect in highway, see **WAX**, 6, 7.

NEGLIGENCE.

Contributory Negligence and Due Care.

1. An apprentice in a machine shop who was instructed to oil a revolving shaft using a step ladder placed at a certain spot, and who finding that spot occupied by castings piled upon the floor, which he might have got permission to remove, put the step ladder in another place and by reason of so doing, while reaching over the shaft which he was attempting to oil, was caught by the sleeve on a set screw on the collar of the shaft, and who testified that it was quite dark at the time, was held to be acting without due care. *Demers v. Marshall*, 9.
2. A laborer who has had considerable experience in working in trenches and laying pipes therein, when ordered into a trench to lay a pipe, is not bound to inspect the sides of the trench before going to work, and in an action for injuries caused to such a workman by the caving in of the side of the trench, it is a question for the jury whether he was in the exercise of due care. *Bartolomeo v. McKnight*, 242.
3. A freight brakeman employed as a switchman, injured while attempting to get on a moving engine in the course of his duty, and falling by reason of a pile of stones lying near the track, from one and a half to three feet high and only ten feet from one of the switches which it was his duty to operate, may be found to be in the exercise of due care, although he had not noticed the pile of stones, which had been there for several months, or, if he had noticed it, forgot it at the moment. *Donahue v. Boston & Maine Railroad*, 251.
4. *Semle*, that in an action against a town for an injury suffered from an alleged defect in a highway, the facts, if proved, that the plaintiff was riding a bicycle in the dark without a lamp outside the travelled part of the highway would warrant a jury in finding that he was not in the exercise of due care. *Kenny v. Ipswich*, 368.

Of person ascending incomplete stairway at a station, *see post*, 5.

Of workman under suspended weight, *see post*, 13.

Of lineman injured by improperly insulated wire, *see post*, 23.

Of manufacturer using machine warranted by the maker as fit for a particular purpose, *see SALE*, 4, 5.

Assumption of risk,

By mill hand from planks thrown down in a dust chimney, *see post*, 15.

By apprentice attempting to oil shaft, *see post*, 16.

By workman in shoe factory slipping on defective floor, *see post*, 17.

By street railway conductor of colliding with tree near track, *see post*, 18.

By switchman on railroad of pile of stones near track, *see post*, 19, 20.

Proximate Cause.

Negligence of fellow servant in making permanent appliances as proximate cause no defence, *see post*, 13.

Liability of machine maker for consequences of a false warranty causing negligence in purchaser, *see SALE*, 4, 5.

On Railroad.

5. In an action against a railroad company to recover for injuries sustained in falling from an unfinished granite staircase designed to be part of the approach to a station of the defendant to be constructed eighteen or twenty feet above the street, it appeared that the steps were laid to within three or four feet of the top; that two or three feet from the lowest step stood a large derrick of which the boom passed over and along the steps near their outer edge extending nearly to the top; that there were piles of broken stone, a mortar bed, rubbish and other indications that work was going on there; that the plaintiff, a girl of sixteen, at about eight o'clock on a dark evening on her way with three other persons to take a train to go to a theatre, leaving the sidewalk followed a little beaten path across the street leading to the steps; that being the foremost of the party she went up the steps and fell on the other side. *Held*, that there was no evidence that the plaintiff was in the exercise of due care. Whether, had that question become material, it could have been found that there was evidence of an implied invitation from the defendant to the plaintiff to approach by the steps, as they were shown to exist with their surroundings, when she wished to take a train, *quære*. *Reimer v. New York, etc. Railroad*, 54.

As to negligence in failing to keep tracks in safe condition for its employees, see *post*, 10, 11.

On Street Railway.

6. Street railway companies carrying passengers on ordinary public streets or highways are not negligent in not providing means for warning passengers about to leave a car of the danger of colliding with or being run over by other vehicles in the street. *Oldy v. West End Street Railway*, 311.
7. A street railway car was stopped by the motorman between two stopping places on account of the approach at great speed of a fire engine and a hose cart. A woman passenger who did not know of the alarm of fire and whose destination was the next stopping place, the name of which had been called by the conductor, proceeded to alight from the car and in doing so was struck by the hose cart and injured. When the car began to lessen its speed the conductor, being on the rear platform, found that the fire apparatus was approaching. He looked over the closed gate at the left of the platform and saw the engine pass on that side and continued to look in the same direction for the purpose of seeing when the hose cart would pass. Almost immediately the hose cart passed on the other side where the passenger was alighting. The conductor did not see the passenger as she came from the car to the platform nor until his attention was called to the other side by the passing of the hose cart, when he saw her on the ground. *Held*, that there was no evidence of negligence on the part of the street railway company. *Ibid*.
8. It is not evidence of negligence on the part of a street railway company that one of its conductors standing in the middle of an overcrowded car did not come to the assistance of a woman passenger weighing more than two hundred pounds who was injured while attempting to get through

Negligence (*continued*).

the crowd and alight from the car at a transfer station of the defendant. *Jacobs v. West End Street Railway*, 116.

Employee of street railway assumes risk of coming in collision with tree near track, *see post*, 18.

Assumption of inconveniences by person taking crowded car, *see STREET RAILWAY*, 4.

Duties of conductor as to alighting passengers, *see STREET RAILWAY*, 5.

Employer's Liability.

Duty to provide safe place to work.

9. Where the nature of the soil and the shape and depth of a trench are such as to require shoring, it is negligence on the part of an employer to put a laborer at work in the trench with its sides unsupported and without providing material for shoring it. *Bartolomeo v. McKnight*, 242.

10. It is the duty of a railroad company to exercise reasonable care to keep its tracks in a safe condition for its employees to work upon. *Donohue v. Boston & Maine Railroad*, 251.

11. A railroad company that suffers a pile of stones varying in size from a man's hand to a man's body, the pile being from one and a half to three feet high, to remain for several months within from eighteen to twenty-four inches of one of its tracks, may be found to be negligent in failing to provide a safe place in which to work for a switchman in its employ, whose duties require him to get upon a moving engine, and who in doing so is injured by reason of such pile of stones. *Ibid*.

Contractor not liable to sub-contractor for failing to provide safe place to work, *see post*, 22.

Duty to provide safe appliances.

12. In an action brought by an apprentice against his employer, to recover for injuries from being caught on a set screw on the collar of a revolving shaft, there was evidence that for ten years previous to the accident set screws to a great extent had been going out of use on account of the adoption of safer substitutes, but were still used in factories as a recognized device for holding the collar to the shaft. *Held*, that the defendant was not bound to change the set screw or to point it out to the plaintiff. *Demers v. Marshall*, 9.

13. In an action by an experienced workman to recover for injuries from the fall of a bar of steel caused by the breaking of a defective link in the chain supporting it, it appeared, that the plaintiff attached the chain to the bar which then was hoisted by means of a crane, the plaintiff steadying the bar with his hand. While he was doing this the link next to the hook broke and the plaintiff received his injuries. The chain used was the only one which reasonably could have been used under the circumstances. It was made in the defendant's works by a fellow servant of the plaintiff, and the defect in the link was due to its being made from old iron instead of new. *Held*, that a verdict for the plaintiff was justified; that the defendant was responsible for the use of due care in preparing a safe appliance for the plaintiff's use, and the chain was a permanent instrument

provided for the very purpose for which it was used when it broke, and was not worn out but broke from inherent defects that should have been avoided in its making and could not be detected by inspection; and that it was no defence that the proximate cause of the breaking of the permanent appliance was the negligence of a fellow servant in making it. *Held, also*, that the fact that the plaintiff was under a suspended weight which would crush him if it fell did not necessarily establish negligence on his part, and on the facts proved he would have been safe under the bar if the link had been made of new iron as it should have been. *Haskell v. Cape Ann Anchor Works*, 485.

Duty to warn.

14. The danger to an employee in a rubber factory feeding rubber into a machine to be pressed between two revolving cylinders of having his hand caught between the rollers is an obvious one, and the employer need not instruct a boy of nineteen how to avoid it. An instruction to the boy, that if the scraps of rubber did not come down he should push them with his left hand, did not justify him in thinking that he could do this without running the risk of getting his hand caught. *Sullivan v. Simplex Electrical Co.* 35.

It is the duty of a superintendent of a cotton mill to warn a workman, whom he has ordered into the bottom of a dust chimney, that he must look out for falling planks which may be thrown down by another workman whom the superintendent has sent up the chimney to put out a fire, see *post*, 15.

As to duty to point out danger from set screw, see *ante*, 12.

Acts of superintendence.

15. In an action by the widow of a workman in a cotton mill to recover for his instantaneous death, caused by being struck by a plank thrown down a dust chimney of the mill, it appeared that the chimney was built with large openings at the bottom into the basement of the mill for the purpose of drawing up and discharging at its top particles of cotton waste and dust. It contained an iron ladder from the bottom to the top and at intervals iron platforms on which were laid planks, the platforms being used by workmen when going up the chimney to sweep down particles of cotton adhering to its sides. There being a fire in this chimney, a workman, sent up the ladder to put it out, threw down two planks which were on fire, and when asked by the defendant's superintendent why he did so, replied that it was easier to put out the fire that way, whereupon the superintendent said "All right." A few hours later another fire broke out in the chimney, and the superintendent called and led the plaintiff's husband with other workmen into the bottom of the chimney where they stood near an alcove which was an enlargement of the bottom of the chimney and had a roof. The superintendent again sent up the ladder the same man who had put out the other fire and thrown down the planks. He threw down another plank which he thought was on fire, which struck and killed the plaintiff's husband, who did not know about the planks being thrown down at the previous fire. He was standing a little inside of the chimney.

Negligence (*continued*).

Before the last plank was thrown down the superintendent had left the place without giving the plaintiff's husband any warning. The workman who threw down the plank testified, that he cried out to warn those below when he did so. The superintendent testified that he expected the workman on the ladder would throw down any planks that were on fire. *Held*, that a verdict for the plaintiff was warranted by the evidence, there being evidence on which the jury might find that the deceased had no notice of the special danger of planks being thrown down and had a right to suppose that the chimney was a safe place, and that there was evidence on which the jury might find that the defendant's superintendent was negligent in knowing the danger and calling on the plaintiff to enter the chimney without warning him of it. The superintendent had no right to assume that the deceased would look out for himself, as the danger was not apparent. The falling of burning cotton waste, which the deceased might have anticipated, would be harmless. *Cote v. Lawrence Manuf. Co.* 295.

Evidence to show negligence of superintendent, see EVIDENCE, 3.

Assumption of risk.

16. An apprentice in a machine shop injured by being caught on a set screw on the collar of a revolving shaft, while attempting to oil the shaft, cannot recover from his employer, the risk being an obvious one which he assumed. *Demers v. Marshall*, 9.
17. In an action by an employee in a shoe factory to recover from his employer for injuries caused by his foot slipping in a depression in the concrete floor of a passage between two machines, it appeared that the plaintiff had been at work in the room where the accident occurred for six months, and for the two weeks preceding the accident was employed on work that required him to pass over this passage every day and it might be many times a day. The depression was filled with leather dust of a darker color than the concrete and appeared to have existed at the time the plaintiff entered the employ of the defendant and continuously until the time of the accident. *Held*, that the risk of injury from this defect was obvious and was assumed by the plaintiff. *Whalen v. Whitcomb*, 33.
18. In an action brought by a street railway conductor against his employer for an injury caused by the plaintiff coming in collision with a tree at the side of the road while stepping around a superintendent of the defendant on the running-board of an open car, it was *held*, that the existence of the tree near the track was a permanent condition of the plaintiff's employment and the plaintiff who had been in the defendant's service for some time took the risk of the danger from it, and that the presence of a person on the running-board was also an obvious and permanent incident of the plaintiff's employment of which he assumed the risk, and the fact that such person was a superintendent of the defendant even if he was engaged in superintending at the time was not material, because the superintendence as such did not contribute to the injury. *Hall v. Wakefield & Stoneham Street Railway*, 98.
19. The existence of an irregular pile of stones, suffered to remain near a

track of a railroad company for several months, is not a risk of employment which a freight brakeman employed as switchman assumes. *Dona-hue v. Boston & Maine Railroad*, 251.

20. If a pile of stones suffered to remain near a track of a railroad company was one of many similar piles substantially the same distance from the rails on that and other tracks, where a switchman's duties called him, *semble*, that such switchman might be held to assume the risk of injury from the pile of stones. Per MORTON, J. *Ibid*.

A workman in a cotton mill does not assume the risk of planks being thrown down a dust chimney, *see ante*, 15.

By lineman from insufficiently insulated wire, *see post*, 23.

Statutory notice.

21. Under the employers' liability act, the notice to the employer required by St. 1887, c. 270, § 3, may be given to a freight agent of a defendant railroad company, who has received such notices for five years, and who on receiving the notice sent it to the defendant's attorney in pursuance of general printed instructions, and in such case it is not necessary to determine whether a notice to a freight agent or an attorney of the defendant would be good, because the facts would justify a finding that the defendant in this case had recognized and acquiesced in the practice followed. *De Forge v. New York, etc. Railroad*, 59.

To sub-contractor.

22. One, to whom a contract for the brick work of a building is sublet by the contractor for the whole building and who is injured by the falling upon him of a floor insufficiently supported, cannot recover from the contractor for such injuries under a declaration alleging that he was employed by the defendant and put to work by him in an unsafe and dangerous place. *Eldred v. Mackie*, 1.

Liability to employee of another using appliances in common.

23. In an action by a lineman in the Boston fire alarm department against an electric lighting company, to recover for injuries caused by a wire of the defendant upon a pole of the defendant which the plaintiff was climbing for the purpose of repairing a fire alarm wire, it appeared, that the pole was in a reservoir lot placed there by the defendant with the permission of the water department of Boston, that the lower cross bar on the pole was used for the wires of the defendant and the upper cross bar belonged to the city of Boston and had two fire alarm wires attached to it. The evidence tended to show, that there was a general interchangeable use by the defendant and the fire alarm department, each of the poles and fixtures of the other, that in every case the party desiring to make use of a pole of the other not in a public street would apply for a permit and that nothing ever was paid by either party to the other for such permit or use. It did not appear to what extent, if any, applications by either party to the other were refused, save that the city had in some cases imposed restrictions. Except as above there was no evidence of any contract or agreement between the city and the defendant as to the interchangeable

use above mentioned or as to this particular pole. *Held*, that a jury would be warranted in finding that there was a general understanding and agreement between the parties that each should use the poles of the other and that the permits from time to time were granted in pursuance of such an agreement, and, if so, the plaintiff in going upon the pole was not a mere licensee, but the defendant was bound to use reasonable care for the protection of those members of the fire alarm department who had occasion to go upon the pole. *Held, also*, that whether the defendant was negligent as against the plaintiff, and whether the plaintiff was in the exercise of due care or assumed the risks, were questions for the jury. *Barker v. Boston Electric Light Co.* 503.

NEW TRIAL.

See PRACTICE, CIVIL, 12-14.

NUISANCE.

1. In an action at common law to recover for an injury caused by ice on a sidewalk formed by reason of a conductor and gutter maintained by the defendant, Pub. Sts. c. 52, § 19, requiring notice of the time, place and cause of injury, has no application. *Leahan v. Cochran*, 566.
2. A householder maintaining a conductor for carrying water from his roof emptying on a shallow granite gutter crossing a public sidewalk, which by its natural and intended use causes ice to form, rendering the sidewalk dangerous for public travel, is liable to one injured thereby for maintaining a public nuisance, although the conductor and granite gutter had been constructed before he bought the house and he never had been requested to change them. *Ibid.*

ORDER.

An order was given and accepted as follows: "J. S. Esq., Administrator of A. B. deceased, and Solicitor of the children of said A. B.: Please pay to X. the sum of \$3,000 when the final distribution is made of the sum due by virtue of [a certain decree in a suit named] and charge the same to my account. C. D." "The foregoing order is hereby accepted. J. S., Administrator and Solicitor." There was no evidence that the children of A. B. knew of the order or authorized J. S. to accept it. *Held*, that the order and acceptance bound J. S. personally. *Held, also*, that the facts, that J. S. was administrator of the estate of A. B. and solicitor for the children, and that there was no money of the estate or of the children in prospect with which to pay the order except what was received under the decree named, did not create an ambiguity which made it necessary to leave the meaning of the contract to the jury. *Held, also*, that the "final distribution" on which the order was payable meant the time of the final entry of the decree ordering the distribution of the whole fund, and not the time when the last dollar of the fund actually should have come to the hands of the person entitled to it. *Hadlock v. Brooks*, 425.

PARTIES TO ACTIONS.

Indorsee of a note must sue in his own name, see **BILLS AND NOTES**.

Change of parties to bill in equity does not make a new suit, see **EQUITY PLEADING AND PRACTICE**, 1.

Persons collaterally interested not necessary parties, see **EQUITY PLEADING AND PRACTICE**, 2.

In action on insurance policy, see **INSURANCE**, 5.

Proper parties to bill in equity to redeem from tax sale, see **TAX**, 7.

PARTNERSHIP.

Whether holders of certificates in reorganized corporation are partners as to the old corporation, see **CORPORATION**.

Construction of covenant to hold retiring partners harmless, see **COVENANT**, 1.

PAYMENT.

A., having a claim against B. for compensation for services, gave to C. an order on B. for a part of the claim, which was accepted by B. A. died, and D., an attorney, was employed by his administrator to collect from B. the balance of the claim. D. was also employed by C. to collect the order. A certain sum by way of part payment for the services of A. was paid to D. the attorney, and a release for the amount paid was given by the administrator of A. This was without the knowledge of C. Later C. sued B. on the order, and B. contended that as D. was attorney for C. when the part payment was made to him, such part payment should be credited on the order. *Held*, that although D. was attorney for C. the part payment was made to him not in that capacity but as attorney for the administrator of A. and that he could not apply the payment to the claim of his other client, and that the administrator owed no duty to B. to see that the order accepted by B. was paid. *Hadlock v. Brooks*, 425.

Burden of proving authority of person to receive payment, see **EVIDENCE**, 2.

Appropriation of payments under entire contract to furnish labor and materials, see **MECHANIC'S LIEN**, 8.

As to the character of a part payment required to take an action of contract out of the operation of the statute of limitations and as to its effect, see **LIMITATIONS, STATUTE OF**, 1-3.

PHOTOGRAPH.

X-ray photographs are admissible in evidence, see **EVIDENCE**, 11.

PLEADING.

Amendment: Substitution of plaintiff, see **EQUITY PLEADING AND PRACTICE**, 1.

Effect of discontinuance against one defendant, see **JUDGMENT**, 1.

When variance is no ground for exception, see **PRACTICE, CIVIL**, 21.

POLICE OFFICER.

A special police officer not the servant of the proprietor of the place of amusement where he serves, see SPECIAL POLICE OFFICER.

POWER.

Construction of power to sell accompanying devise for life and as to what is a proper execution of such a power, see DEVISE AND LEGACY, 6.

As to what is a proper execution of power of sale in a mortgage, see MORTGAGE, 1.

PRACTICE, CIVIL.

Appeal.

1. Where a writ has been served by trustee process and judgment is entered against the defendant and the trustee, and the defendant appeals but the trustee does not, whether the question of charging the trustee is open to the defendant on his appeal, *quære*. *Choquette v. Ford*, 6.
2. Where an appeal from a district court to the Superior Court is not perfected by the filing of a bond within the required time, the Superior Court cannot affirm the judgment of the district court appealed from, having no jurisdiction because no appeal has been taken. Its jurisdiction is confined to cases where an appeal having been taken lawfully, the appellant fails to enter and prosecute it. But where no bond is filed in time, the judgment of the district court is not vacated, and application should be made to the Superior Court to dismiss the appeal for want of jurisdiction. *Snow v. Dyer*, 393.
3. The provision of St. 1893, c. 396, § 25, permitting an extension of the time for filing the bond required on an appeal from a district court to the Superior Court, expressly excepts actions for forcible entry and detainer under Pub. Sts. c. 175, and in order to perfect an appeal in such an action the bond must be filed within the twenty-four hours allowed for taking the appeal. *Ibid*.
4. Under St. 1893, c. 396, § 25, a district court has no power to extend the time of twenty-four hours allowed by § 24 for taking an appeal to the Superior Court. It has power to extend the time for filing the bond required to perfect the appeal, but not beyond the next return day of the Superior Court. *Semble*, however, that when the party against whom a decision is to be made expresses an intention to appeal and a desire to have the time for filing the bond extended beyond the next return day, it is within the power of the district court in its discretion to postpone the formal entry of the judgment to a reasonable time, even to a time beyond the next return day, so that the proposed appellant then may be prepared to file his bond. *Ibid*.
5. In the Municipal Court of the city of Boston a plaintiff declared on an account annexed with seven items amounting in all to \$40, with a credit of \$5, leaving the balance sued for \$35. He obtained judgment for \$12,

and costs amounting to \$3.66. Thereupon, the plaintiff appealed to the Superior Court, which gave him judgment for \$16. The defendant claimed costs after the appeal, under Pub. Sts. c. 198, § 4, on the ground that the Superior Court included in its judgment for \$16 interest from the date of appeal to the date of its judgment, and that, allowing for the interest so included, the plaintiff did not recover a greater sum for debt or damages than he recovered by the first judgment. *Held*, that there was nothing to show that the increase in the amount recovered was for interest, that it did not even appear that the finding of the Superior Court was upon the same items of the account as that of the Municipal Court, and that the plaintiff was entitled to full costs. *Crandall v. Colley*, 339.

No appeal from refusal of Superior Court to grant new trial, *see post*, 13.

Arrest of Judgment.

6. In an action for a conversion, the omission from the declaration of an allegation of the plaintiff's possession cannot be taken advantage of after verdict for the plaintiff on a motion for arrest of judgment, as the objection does not affect the jurisdiction of the court as required by Pub. Sts. c. 167, § 82. Moreover, in this case, there was evidence that the property converted belonged to the plaintiff, and the judge in his charge assumed this fact without objection from the defendant. *Dean v. Ross*, 397.

Charging Jury.

7. For a presiding judge to state his recollection of the evidence is not charging the jury with respect to matters of fact. *Haskell v. Cape Ann Anchor Works*, 485.

Costs.

Motion for additional costs on overruling motion for new trial, *see post*, 14.
For costs on appeal from Municipal Court, *see ante*, 5.

Exceptions.

8. The admission of immaterial evidence will not sustain an exception, where the excepting party in no way could have been harmed by it. *Lord Electric Co. v. Morrill*, 304.
9. An exception will not be sustained to the admission of evidence which could not have applied to any question submitted to the jury and therefore could not have harmed the excepting party. *Hoar v. Tilden*, 157.
10. A presiding judge may require a party who has filed exceptions and a motion for a new trial based on the same questions of law, to elect upon which he will proceed, and may refuse to hear the motion unless the party waives his exceptions; but if the judge does not require such election, the fact that the party filing exceptions has argued the same points of law on a motion for a new trial does not prevent the allowance of his exceptions. *Wheeler v. Klaholt*, 141.
11. A school-teacher without paying rent or board lived in a boarding-house kept by her grandmother, whose lease had expired and been extended, assisted her grandmother in keeping the boarding-house, and received from

Practice, Civil (*continued*).

her a bill of sale of the household goods and furniture in the house. It was found as a fact by a judge sitting without a jury, that what the granddaughter did in and about the house was only to assist her grandmother, and that she had never agreed to pay rent and was not a party to any plan to defraud the lessor. *Held*, that all requests for rulings as to the liability of the granddaughter for use and occupation of the premises jointly with her grandmother had been made immaterial by the findings of fact. *Austin v. Whittle*, 155.

Exceptions will not be disallowed because requests for rulings were not shown to or known by the other side, see *post*, 18.

See also *post*, 15-18.

New Trial.

12. The provision of St. 1897, c. 472, § 1 that "In civil causes in which any questions or issues are submitted to a jury a verdict shall not be set aside except upon a motion in writing of one of the parties specifying the grounds relied upon in support of it" has no application to the setting aside by a judge of a verdict which he himself previously has ordered. He has power to do this of his own motion. *Forbes v. New York Life Ins. Co.* 139.

13. No appeal lies from the decision of a presiding judge of the Superior Court overruling a motion for a new trial on the ground of newly discovered evidence. *Freeman v. Boston*, 403.

14. Under Pub. Sts. c. 153, § 7, providing that in all cases in which a motion for a new trial is not sustained, the court may in its discretion impose upon the moving party such sum to be taxed in the costs of the suit as it shall deem proper, a motion that a sum be imposed as such costs must be made in the court in which the case was tried. *Ibid*.

Party may be required to elect between exceptions and motion for new trial, see *ante*, 10.

Rulings and Instructions.

15. A presiding judge is not bound to rule on the sufficiency of the plaintiff's evidence to maintain the action until the evidence is closed upon both sides, but he may if he chooses take the case from the jury at any stage of the trial. *Hall v. Wakefield & Stoneham Street Railway*, 98.

16. A presiding judge is justified in refusing to give an instruction requested, if it assumes the existence of a fact which the jury might or might not find to be proved. *Whitaker v. Ballard*, 584.

17. In an action for personal injuries, where the question of the due care of the plaintiff is in issue, the presiding judge properly may refuse a request which singles out certain circumstances and asks the judge to rule upon their effect on the question of the due care of the plaintiff, apart from other circumstances bearing upon the same issue, although the ruling requested may be correct as an abstract proposition; and such refusal especially is justified when the request is made after the judge's charge. *Kenny v. Ipswich*, 368.

18. Exceptions will not be disallowed or dismissed on the ground that the request for a ruling refused by the presiding judge was not shown to the

counsel on the other side and that it was not known to him that the ruling was asked for or an exception to the refusal to give it taken, he all the time being present in court. *Semble*, however, that the general practice, that each party to a case should know what requests are made by the other party and should have an opportunity to be heard thereon if he so desires, is founded in justice and should be followed as the proper course. *Kenny v. Ipswich*, 368.

See also *ante*, 8-11.

Construction of Report of Trial Judge.

19. In an action by a bank to recover back money paid by it to another bank through the Boston clearing-house on a note of a corporation which failed the same day, the defendant sought to prove a custom of banks sending notes through the clearing-house fixing a time within business hours when the conditional payment of a note by its having gone through the clearing-house becomes absolute if the note is not returned. The judge below in reporting the case stated his action as follows: "I find also that such a rule has not been established by a universal, uniform and general custom, and rule that a custom, if one exists, to return such notes before the end of the business hours of the receiving bank would be bad." *Held*, that this was not a finding of fact that no such custom existed, but a ruling of law that such a custom if it existed would be bad. *Atlas National Bank v. National Exchange Bank*, 531.

Reservation adopted on Supposed Compulsion.

20. Where the conclusion of a report of a case from the Superior Court declared that "If the said rulings of law and refusals to rule, or any of them are wrong, judgment is to be entered for the defendant," and the judge in reporting the case stated that he signed the report in this form "understanding that no other course was open" to him under a decision of this court given at a previous stage of the case, whereas this court had not intended to give any directions upon the point, this court did not give judgment for the defendant, although one of the rulings referred to was wrong, but ordered the report discharged and a new trial granted. *Atlas National Bank v. National Exchange Bank*, 531.

• *Variance.*

21. A variance between the statement of a contract in an account annexed and its proof at the trial, which does not affect the amount claimed, and the correction of which would not have changed the course of the trial, and which was not called to the attention of the presiding judge or of the plaintiff's counsel, cannot be the ground of an exception. *Lord Electric Co. v. Morrill*, 304.

Procedure in assessing damages against the town of Brookline for water rights taken under private act, see **DAMAGES**, 8.

Effect of discontinuance against one defendant, see **JUDGMENT**, 1.

Amendment of petition to enforce mechanic's lien, see **MECHANIC'S LIEN**, 8.

PRACTICE, CRIMINAL.

1. Where a prisoner was sentenced for a period longer than authorized by the statute under which he was indicted, the sentence was reversed on writ of error, and the case remanded to the Superior Court for sentence by that court according to law. *Smith v. Commonwealth*, 340.
2. If a defendant in a criminal case which comes to the Superior Court on appeal has a right to have a separate copy of the complaint against him in the court below go to the jury without the judgment entered on it, in order that his case may not be prejudiced by the jury's knowing of his conviction in the court below, this practice is sufficiently complied with by giving the jury a copy of the complaint and record of conviction with a blank paper pasted over the record of conviction. *Commonwealth v. Tate*, 121.

PREFERENCE.

Under bankruptcy act, see **BANKRUPTCY ACT**, 1.

Non-surrender of, under bankruptcy act, see **BANKRUPTCY ACT**, 3.

If any part of a sale or conveyance is fraudulent as an unlawful preference, the whole is void, see **INSOLVENCY**, 1.

A conveyance made in pursuance of a promise in general terms to give security out of one's property is an unlawful preference, see **INSOLVENCY**, 2.

For case of preference fraudulent at common law, see **BANKRUPTCY ACT**, 1.

PROBATE BOND.

Validity of, see **BOND**, 1-3.

RAILROAD.

Duty to keep tracks in safe condition for its employees, see **NEGLIGENCE**, 10, 11.

RELIGIOUS SOCIETY.

What land is included in exemption from taxation of houses of religious worship, see **Tax**, 1, 2.

RESERVATION.

Construction of clause in a deed reserving water power, see **WATER-COURSE**, 2.

RES JUDICATA.

A bill in equity by an executrix, seeking a reconveyance of certain real estate conveyed to the defendant by the plaintiff's testatrix, alleged that, such testatrix being unable to write her name, the defendant induced her to affix her mark to a deed of the property in question by a representation that it was a merely formal matter, saying to her "I want you to sign this paper. It does n't amount to anything," and that the plaintiff's testatrix

executed the instrument, believing that by so doing she was not conveying away any right in her property. After a hearing on the merits, the bill was dismissed by a final decree not appealed from. Subsequently, by a second bill in equity, the same plaintiff sought from the same defendant a reconveyance of the same property, alleging that the plaintiff's testatrix, being seventy years of age, unable to read or write and of failing mind, formerly lived with the defendant, the husband of her daughter since deceased, that after her daughter's death the plaintiff's testatrix determined to live with the plaintiff, and that thereupon the defendant by his inducement, persuasion and undue influence procured her assent to the conveyance of the property to him without consideration, and that the conveyance was not the free act of the plaintiff's testatrix but was the will and act of the defendant. To this second bill the defendant pleaded *res judicata*, setting up the decree dismissing the plaintiff's first bill. *Held*, that the plea was good and the decree a bar to the plaintiff's second bill; that the two bills were generically for the same alleged grievance, namely, that the plaintiff's testatrix was given by the defendant an improperly created motive for making the conveyance to him, and differed only in the statement of the motive, and the plaintiff was bound to bring forward in support of her first bill all the matters stated in her second bill. *Hoseason v. Keegan*, 247.

RIPARIAN OWNER.

One through whose land a brook flows cannot wholly divert its waters, see WATERCOURSE, 1.

Construction of clause in deed reserving water power, see WATERCOURSE, 2.

What is a substantial diversion of water power, see WATERCOURSE, 3.

SALE.

Validity.

1. Section 21 of Pub. Sts. c. 60, requires oats to be sold by the bushel. Section 22 of the same chapter requires a bushel of oats to be thirty-two pounds. A sale of oats by the bag under a custom requiring each bag to contain two bushels of thirty-two pounds each is a valid sale. *Eaton v. Kegan*, 114 Mass. 433, distinguished. *Eldridge v. McDermott*, 256.

Sale fraudulent in part as unlawful preference wholly void, see INSOLVENCY, 1.

Delivery.

2. Goods were ordered by the defendant to be shipped "direct prepaid freight and await billing." The plaintiff shipped the goods by rail marked with the name and place of business of the defendant, to be delivered to the order of the consignee, prepaid the freight, and took from the railroad company a temporary receipt in his own name stating these facts and also stating that the receipt was to be exchanged for the company's bill of lading. No bill of lading was in fact issued. *Held*, that the plaintiff could maintain goods sold and delivered, the delivery

Sale (continued).

to the carrier in accordance with the order being a delivery to the defendant, and the taking of the temporary receipt by the plaintiff being in no way a reservation of the *jus disponendi*. *Dr. A. P. Sawyer Medicine Co. v. Johnson*, 374.

Acceptance.

3. Goods were shipped by A. to B., an intending purchaser, but after their receipt the contract of sale was repudiated by both parties. A. then wrote to B. that he could keep the goods "at the price you offer if you send us net spot cash at once. If you cannot send us cash draft by return mail, please return the goods to us immediately." B. sent a draft to A. for the price less four per cent. A. returned the draft saying that there was no deduction of four per cent and "if not satisfactory please return the goods at once by freight" via a certain railroad named. A. heard nothing more until thirty-five days later, when he was notified by the railroad company that the goods had arrived. The appearance of the returned goods showed that they had been handled and somewhat defaced. *Held*, that there was evidence of a sale to go to a jury, B.'s failure to return the goods promptly being evidence of an acceptance of A.'s terms although the requirement of immediate payment was not complied with, A. having the right to waive this if he saw fit. *Wheeler v. Klaholt*, 141.

Warranty.

4. A machine maker of established reputation who on an order from a manufacturer makes and delivers a machine to be used for a certain purpose, with a defect obvious upon inspection, is liable to such manufacturer for the amount of damages lawfully paid by him to his employees injured by an accident, caused by his negligence in using the machine for the purpose for which it was ordered without a previous inspection. *Boston Woven Hose, etc. Co. v. Kendall*, 232.
5. A manufacturer of rubber goods ordered from a boiler maker of established reputation a boiler that would stand a working pressure of a hundred pounds, for the purpose of devulcanizing rubber by means of naphtha vapor. The boiler maker accepted the order and made and delivered a boiler, which was defective by reason of the construction of the hinge of its door, which prevented such door from being screwed tightly enough against the packing. The defect was patent and would have been discovered by inspection. The manufacturer without inspection proceeded to use the boiler for devulcanizing rubber, whereupon at a pressure of seventy-five pounds the packing blew out, allowing the naphtha vapor to escape and cause an explosion, in which several of the manufacturer's employees were injured. The manufacturer, on the ground that he was liable to his injured employees on account of his negligence in failing to inspect the boiler, paid them the damages to which they were entitled and sued the boiler maker to recover the amount thus paid. *Held*, that on these facts a verdict for the plaintiff could be sustained, on the ground that the plaintiff's failure to inspect the boiler before using it was due to the warranty or representations of the defend-

ant, the consequences of the false warranty being not too remote. Whether the injured workmen could have recovered against the boiler maker directly, and whether such liability of the defendant is a necessary condition of a recovery over, as by the plaintiff in this case, *quare*. *Boston Woven Hose, etc. Co. v. Kendall*, 232.

For unrecorded bill of sale given as security, see MORTGAGE, 2.

SEAMAN.

U. S. Rev. Sta. § 4527 providing, that a seaman discharged before one month's wages are earned, without fault on his part and without his consent, shall receive in addition to any wages he may have earned a sum equal in amount to one month's wages as compensation, does not impose a penalty or forfeiture, but establishes a rule of damages for breach of contract, and the State court has jurisdiction of an action at common law to recover such compensation. *Calvin v. Hunley*, 29.

SEISIN.

1. Whether a seisin is instantaneous must depend upon all the facts and circumstances of the case. If there is no dispute in regard to the facts, the question whether the seisin was instantaneous is one of law for the court. If the facts are in dispute, the question is for the jury under suitable instructions. *Sprague v. Brown*, 220.
2. A finding of a jury, that a deed from A. to B. and a mortgage from B. to C. "were delivered simultaneously at the Registry of Deeds" on a certain day, does not conclusively show that the deed and mortgage constituted parts of one transaction in which the seisin was instantaneous, and in the absence of a finding by the jury that the seisin was instantaneous, it cannot be said to be so as a matter of law. *Ibid*.

SENTENCE.

Remanding for sentence, see PRACTICE, CRIMINAL, 1.

SET-OFF AND RECOUPMENT.

In an action for the price of goods sold, it appeared that the defendant agreed to purchase the goods of A. and that the plaintiff bought out A.'s business and furnished the goods to the defendant. The defendant declared in set-off alleging that he had bought other goods of A. under a contract by which A. agreed to allow him as great a discount as that allowed to any other customer, and that A. had broken this agreement, and had been overpaid by the defendant the sums which he sought to be allowed in set-off. *Held*, that even if the novation between the plaintiff and defendant had adopted the terms of the agreement alleged in set-off, it would not follow that a claim founded on the failure of A. to allow the

proper discount on sales made by him could be set off against the claim of the plaintiff for the price of goods sold by the plaintiff to the defendant. *Elastic Tip Co. v. Arnold, Schwinn & Co.* 101.

For set-off and counterclaim under bankruptcy act, see **BANKRUPTCY ACT**, 2.
Whether mortgagee without mortgagor's consent can deduct interest due him from balance of original loan remaining in his hands, see **CONTRACT**, 7.

SPECIAL POLICE OFFICER.

A special police officer appointed under St. 1878, c. 244, § 6, by the city of Boston on the application of the proprietor of a place of amusement to serve without pay from the city, is not the servant of such proprietor, and, if he commits an assault while in the discharge of his duties, the only remedy against the proprietor is on his bond to the city treasurer required by that section, making the proprietor liable to parties aggrieved by any official misconduct of such police officer. It is not necessary or possible to get any preliminary judgment against such proprietor before proceeding upon the bond. Whether it is necessary to get a judgment against the officer before so proceeding, *quære*. *Healey v. Lothrop*, 151.

STATUTE.

For rule of construction as to constitutionality, see **CONSTITUTIONAL LAW**, 1.
Construction of statute giving right to dispute prior attachment, see **ATTACHMENT**.
Illegitimate child not within the meaning of "children, relatives of," in statute relating to fraternal beneficiary associations, see **FRATERNAL BENEFICIARY ASSOCIATION**, 1.
Construction of statute establishing metropolitan park commission, see **METROPOLITAN PARKS DISTRICT**, 1.
Construction of metropolitan water supply act, see **METROPOLITAN WATER SUPPLY ACT**.
Construction of statute creating department of supplies of city of Lowell, see **MUNICIPAL CORPORATIONS**, 2, 3.
U. S. Rev. Sts. § 4527, regulating rights of discharged seaman is not penal, see **SEAMAN**.

STATUTE OF FRAUDS.

See **FRAUDS**, **STATUTE OF**.

STATUTE OF LIMITATIONS.

See **LIMITATIONS**, **STATUTE OF**.

STATUTES CITED AND EXPOUNDED.

See page 703.

STREET RAILWAY.

1. The statutes of this Commonwealth permit the construction of street railways in part through private lands with the consent of the owners or when the lands are acquired by purchase, if all other requirements are complied with. *Farnum v. Haverhill, etc. Street Railway*, 300.
2. Pub. Sta. c. 112, § 197, providing that a traveller who does not pay his fare "shall not be entitled to be transported for any distance, and may be ejected from a street railway car" applies to electric cars although it was enacted before their introduction. *Hudson v. Lynn & Boston Railroad*, 64.
3. The conductor of an electric car lawfully may eject a passenger whose conduct is such as to justify an inference of his intoxication and cause a just apprehension of acts of impropriety, rudeness or disturbance on his part. The conductor need not wait until some act of this kind has been committed. *Ibid.*
4. *Semble*, that passengers who choose to take passage on a street car which is so crowded that they have to stand on the rear platform or on the steps and thereby block the exit from the car, assume all inconveniences incident thereto, including that of temporarily alighting when necessary to allow a proper exit for passengers who wish to get off. Per LORING, J. *Jacobs v. West End Street Railway*, 116.
5. *Semble*, that it is the duty of the conductor of a street railway car who is on the rear platform when a passenger is alighting, to see to it that the passenger has an opportunity to alight with safety, and that it is his duty to cause passengers who are blocking the exit to stand aside or even alight from the car temporarily. Per LORING, J. *Ibid.* See also NEGLIGENCE, 8.

Liability of street railway for improper manner of ejecting obnoxious passenger, and for liability for loss of life in such case under St. 1886, c. 140, see ASSAULT AND BATTERY, CIVIL.

No duty to warn alighting passenger of danger from passing vehicles, see NEGLIGENCE, 6, 7.

SUPERIOR COURT.

The decision of commissioners, appointed under St. 1890, c. 428, to prescribe the alterations and apportion the work upon the abolition of a grade crossing, is final as to matters of fact, and a judge of the Superior Court has no power to order a review of a former decree of that court confirming a decision of such commissioners, on the ground that a widening of the space between the abutments on the two sides of the road under the railroad bridge would add to the public safety and convenience to an extent sufficient to justify the additional expense. *Hadley, petitioner*, 319.

Jurisdiction of, where appeal from district court is not perfected, see PRACTICE, CIVIL, 2.

SURETY.

A surety on a trustee's bond is liable for any default on the part of the trustee in not accounting for assets received before as well as after the execution of the bond. *McIntire v. Linehan*, 263.

For subrogation of surety under bankruptcy act, see **BANKRUPTCY ACT**, 3.

SURVIVAL OF ACTIONS.

Right to redeem land from tax sale survives, see **ACTION, SURVIVAL**.

Civil action for assault survives, see **ASSAULT AND BATTERY, CIVIL**.

TAX.

Houses of Religious Worship.

1. Under Pub. Sts. c. 11, § 5, cl. 7, exempting from taxation "houses of religious worship owned by a religious society," land purchased by a religious society for the erection of a church thereon for which plans have been prepared is not exempt from taxation until the construction of the church has begun. *All Saints Parish v. Brookline*, 404.
2. A religious society purchased a lot of land containing 40,955 square feet on the corner of a suburban avenue, for the construction of a large stone church thereon, for which plans had been prepared. On account of insufficient funds, the construction of the stone church was not begun for more than two years thereafter, but upon one side of its intended site a small wooden church was built and used for worship, which on the completion of the stone church was to be removed to the corner of the lot to be used for a Sunday school. The assessors of the town, in the two years before the beginning of the construction of the stone church, assessed a tax on twenty thousand square feet of the lot, exempting from taxation the wooden church building and the remainder of the land, not designating by any line of division the land assessed and the land exempted. There was no fence on the premises except that enclosing the whole as one lot. *Held*, in an action by the society against the town to recover back the taxes assessed as above and paid under protest, that the burden was on the plaintiff to show that the whole lot was exempt from taxation, as, if any part of it was taxable, the plaintiff's remedy was by application for an abatement; and that there was no error in assessing the tax upon the portion of the lot which was intended for the erection of the stone church, there being no house of religious worship nor any part of such a house upon it, and it not being shown that the whole lot was needed for the small wooden church or that it was used as a reasonably necessary or proper incident to the maintenance and use of that church. *BARKER, J.*, dissenting, on the ground that the whole lot from the date of its purchase by the parish had been dedicated to public worship, and that the immediate erection and continued use of a temporary wooden church, and the prosecution with all reasonable promptness of the work of building a permanent

church, were the same in legal effect as if the stone church had been begun when the wooden one was. *All Saints Parish v. Brookline*, 404.

Sale.

Character of title.

3. *Seemle*, that a tax title is a new title and not merely the sum of all old titles. Per HOLMES, C. J. *Emery v. Boston Terminal Co.* 172.

Validity of deed.

4. Under St. 1888, c. 390, § 30, a demand for payment within fourteen days must be made upon a resident owner before his land can be sold for taxes. Section 33 of the same chapter in regard to non-resident owners does not require such demand. Section 43 of the same chapter requires that a tax deed shall state the cause of sale. A tax deed stated as the only cause of sale that, the owner of the land being a non-resident in the city and the taxes still remaining unpaid, the land was duly advertised for sale. In fact, the owner was a resident and a demand for payment within fourteen days had been made, but this was not stated in the deed. *Held*, that the deed was void for non-compliance with the statute. *Downey v. Lancy*, 465.

Redemption.

5. The right of a mortgagee to redeem from a tax sale is not lost by foreclosure and passes to a purchaser at the foreclosure sale. *Ibid.*
6. In a suit to redeem land from a tax sale brought under St. 1888, c. 390, § 76, it appeared, that the defendant was a purchaser of tax titles, and there was evidence tending to show, that he intentionally avoided a tender during the two years after the tax sale, and thereafter refused to release except upon payment of a bonus, and that the plaintiff from the time of his discovery of the tax sale had endeavored to find the defendant and make tender before the two years had expired, and thereafter had been reasonably diligent in his efforts to obtain a release. *Held*, that the evidence warranted a finding that the plaintiff was entitled to relief, and that, the plaintiff having been always ready to redeem, the conduct of the defendant dispensed with the necessity of an actual tender. *Clark v. Lancy*, 460.
7. One, who without consideration takes a conveyance of land from the purchaser thereof at a tax sale, holds the land as trustee for the party entitled to redeem, and is properly made a party to a bill to redeem, with no rights beyond those of his grantor. *Ibid.*
8. Sections 46, 58 and 59 of St. 1888, c. 390, providing, that when the purchaser of land sold for taxes cannot be found after reasonable search, the owner seeking to redeem may make payment of the required sum to the treasurer of the town in which the land is situated, give a cumulative remedy, and do not exclude the right to equitable relief under § 76 of the same chapter. *Ibid.*
9. The right to maintain a bill to redeem land from a tax sale under St. 1888, c. 390, § 76, is not limited to the owner or mortgagee who was such at the time of the tax sale, and where an owner of land, which previously had been sold for taxes without his knowledge, sold and conveyed the

TAX (*continued*).

land and took a mortgage back, and subsequently on learning of the tax sale brought a bill to redeem under St. 1888, c. 390, § 76, and died, it was held, that the purchaser from the deceased had such an interest that he could have been admitted to prosecute the suit in the name of his grantor before his death if for any reason the grantor had declined to go on, and on the grantor's death could have procured the revival of the suit under Pub. Sts. c. 165, § 19, and proceeded in the name of his grantor's administrator, and therefore that such purchaser by an amendment of the bill properly could be made a plaintiff in the suit brought by his grantor, and that the five years within which the suit could be brought were to be reckoned as to him from the filing of the original bill. *Clark v. Lancy*, 460.

Right to redeem from tax sale survives, see ACTION, SURVIVAL.

Evidence of residence of owner, see EVIDENCE, 6.

Computation of time within which bill to redeem must be brought, see TIME.

On Corporate Franchises and Property.

10. The corporate franchise tax under Pub. Sts. c. 13, § 40, and the local tax on the property of a corporation are not complementary taxes. The determination by the tax commissioner of the value of real estate and machinery subject to local taxation, to be deducted from the valuation of the capital stock under the provisions of that section, does not bind the assessors of the city or town where they are situated, and if the tax commissioner adopts the valuation of the real estate and machinery of a manufacturing corporation made by the assessors of a city, and the corporation pays its franchise tax upon that basis, this does not deprive the corporation of its right to apply to the assessors under Pub. Sts. c. 11, for an abatement of the tax on the ground of over-valuation and to appeal from their decision to the Superior Court under St. 1890, c. 127. *Tremont & Suffolk Mills v. Lowell*, 469.

On Collateral Legacies and Successions.

11. The tax imposed on collateral legacies by St. 1891, c. 425 is to be assessed on the value of the testator's property at the time of his death, and not upon its value at the time of distribution. *Hooper v. Bradford*, 95.
12. The tax imposed on collateral legacies by St. 1891, c. 425 cannot be assessed on income derived from a testator's estate after his death. *Ibid.*

TENDER.

Tender in redemption from tax sale dispensed with by conduct of defendant, see TAX, 6.

TIME.

In computing the five years from the sale within which a bill to redeem land from a tax sale must be brought under St. 1888, c. 390, § 76, the day on which the sale was made is to be excluded. *Clark v. Lancy*, 460.

Computation of time to redeem from tax sale in case of revivor of original bill, see TAX, 9.

TITLE COMPANY.

As to obligations in certifying title, see EQUITY JURISDICTION, 4.

TRADE-MARK.

1. *Semble*, that the right to use a word as a trade-mark does not depend on originality even as against the originator of the peculiar use. Per HOLMES, C. J. *Burt v. Tucker*, 493.
2. A manufacturer of shoes in Massachusetts adopted a label with the word "Knickerbocker" as a general mark for his goods or a large variety of them, although he also used other marks for goods made to order for particular firms. Two years later his factory was burned, and he went out of business and for four years was in the employ of others as a salesman in other States. At the end of that time he resumed business for himself in Philadelphia selling the goods of a New Jersey company as a jobber, adopted the title "Knickerbocker Shoe Company" and used the word "Knickerbocker" on his packages with a label similar to the one he formerly used. He testified that he never had intended to abandon the use of the word "Knickerbocker" as a trade-mark regarding it as a valuable possession and that he resumed it at the first opportunity. During the four years that this former manufacturer was working for others, the word "Knickerbocker" had been adopted as a trade-mark by another manufacturer of shoes. In a suit brought by the last named manufacturer against the first named for alleged infringement of his trade-mark, it was *held*, that the judge who tried the case was warranted in finding, that the defendant had made the word "Knickerbocker" a trade-mark, that he had not abandoned it, and that his present use of it was within the scope of his original acquisition. *Ibid*.

TRADING STAMPS.

Delivering trading stamps with articles sold for cash in accordance with previous announcement, entitling the purchaser to select and receive one of a number of articles exhibited at the store of an independent corporation issuing the stamps, is not a violation of St. 1898, c. 576, as there is no gambling element in the transaction. That statute, as construed by the court, merely prohibits the use of trading stamps in transactions involving the element of chance. *Commonwealth v. Sisson*, 578.

TRUST, RESULTING.

Whether there is a resulting trust in a benefit in a fraternal beneficiary association, see FRATERNAL BENEFICIARY ASSOCIATION, 3.

TRUSTEE PROCESS.

Where, in an action not for the price of necessities, two successive services of a writ were made by trustee process upon the employer of the defendant

as trustee, and the trustee had in his hands at the time of each service upon him a sum less than twenty dollars due the defendant as wages, and thereafter the plaintiff failed to enter his writ and brought a new writ for the same claim adding another defendant as copartner of the defendant in the first writ, and served it upon the same trustee, and it appeared that the trustee had still in his hands the wages previously attempted to be attached, which in all exceeded the sum of twenty dollars, and nothing appeared to show want of good faith on the part of the plaintiff in abandoning his first action and bringing another against the two defendants, it was held, that the defendant's wages in the hands of the trustee in excess of twenty dollars were not exempt from attachment, the plaintiff being in the same position as if the new action had been brought by a third party. *Choquette v. Ford*, 6.

Whether question of charging the trustee is open on an appeal by the defendant alone, see PRACTICE, CIVIL, 1.

USAGE.

A custom of banks sending notes through a clearing-house fixing a time within business hours when the conditional payment of a note by its having gone through the clearing-house becomes absolute if the note is not returned, if established by proof, is valid. *Atlas National Bank v. National Exchange Bank*, 531.

VARIANCE.

When no ground for exception, see PRACTICE, CIVIL, 21.

VERDICT.

A judge may of his own motion set aside a verdict previously ordered by him, see PRACTICE, CIVIL, 12.

WAIVER.

Tender in redemption from tax sale dispensed with by conduct of defendant, see TAX, 6.

WARRANTY.

Liability of machine maker for consequences of false warranty as to fitness of machine for particular use, see SALE, 4, 5.

WATERCOURSE.

1. One through whose land a brook flows cannot wholly divert its waters, but must use them in such a manner as not materially to interfere with the flow of the water in the brook below. *Forsgate v. Hudson*, 225.

2. The owner of a mill pond created by damming a natural stream conveyed to a railroad company, for the purpose of constructing and maintaining its road, land on both sides of the pond "with all privileges, and appurtenances thereto belonging," "Reserving, however, to the grantor, his heirs and assigns forever the right to all the water power created by a dam on the premises of the present height of the rolling part of the dam now standing on the premises." *Held*, that by this reservation the owner reserved the right to have all the water that naturally would come down the stream to the dam flow over it, and that any substantial diversion of the water by the railroad company, as it passed over its land before reaching the dam, would constitute an interference with the rights of the mill owner which would be enjoined in equity. *Whitney v. Fitchburg Railroad*, 559.
3. A diversion of water from a mill pond amounting to twenty-six one hundredths of a horse power a day, the total power of the mill owner's privilege being two hundred horse power a day, is a substantial diversion which, if unauthorized, will be enjoined in equity. Whether an unauthorized diversion not substantial would be enjoined, *quære*. *Ibid*.

WATERWORKS.

For assessment of damages for land and water rights taken, see DAMAGES, 1, 8.

Evidence of value of water rights taken, see EVIDENCE, 10.

When purpose of taking land for water supply is sufficiently stated, see EMINENT DOMAIN, 3.

Construction of a taking of water rights, see EMINENT DOMAIN, 4.

Sufficiency of notice of taking land for water supply, see CONSTITUTIONAL LAW, 6.

WAY.

What constitutes.

1. A flight of stairs in a building belonging to a city or town, leading from the outside of the building only to a room in it, is not a highway or town way within the meaning of Pub. Sts. c. 52, §§ 17, 18, giving remedies for death, injury or damage caused by defects therein, nor is it a way "entering on and uniting with an existing public highway" within Pub. Sts. c. 49, § 95, in regard to causing the entrances of such ways to be closed when the public safety demands it or cautioning the public against entering them when dangerous. *McNeil v. Boston*, 326.

Dedication.

2. Whether land belonging to a city or town seemingly prepared for a footway and used by the public as such, ever can become a highway or town way by dedication, notwithstanding Pub. Sts. c. 49, § 94, *quære*. *McNeil v. Boston*, 326.
3. Permitting the use by the public of an ordinary entry or flight of stairs in a building belonging to a city or town is not a dedication, even if a public footway could be so created. *Ibid*.

Way (*continued*).

Alteration and Discontinuance.

4. The selectmen of a town, in a vote to widen and straighten a certain road which crossed a railroad, described the limits of the new road until it reached the railroad, then beginning again on the other side of the railroad described the limits of the road beyond, and then declared "all portions of the old road not included to be discontinued." *Held*, that the highway was not discontinued where it crossed the railroad but in that part remained unchanged. *Nickerson v. New York, etc. Railroad*, 195.

No damages for alteration or discontinuance of way, where no land is taken, unless special and peculiar, see DAMAGES, 2-4.

Assessment of damages resulting from abolition of grade crossing, see DAMAGES, 2-6.

No consequential damages recoverable for abolition of grade crossing, see DAMAGES, 6.

Extent of Public Easement.

5. An abutter on a highway in a town, owning the fee to the centre of the way subject to the public easements, has no ownership in the highway that is affected by the construction and maintenance thereon under Pub. Sts. c. 112, §§ 223, 224, by a quarry company with the consent of the selectmen of the town, of a freight horse railroad for the transportation of stone from the quarry of the company to a steam railroad about a mile distant for distribution to purchasers. This is the use of an easement taken when the highway was created. *White v. Blanchard Bros. Granite Co.* 363.

Public easement does not embrace use for steam railroad, see EMINENT DOMAIN, 1.

Pub. Sts. c. 112, §§ 223, 224, permitting the construction of a freight railway in a highway for private use, is constitutional, see CONSTITUTIONAL LAW, 8.

Defect in Highway.

6. Whether and to what extent a highway must be made safe and convenient for persons riding on bicycles, *quære*. *Kenny v. Ipswich*, 363.
7. A city is not liable for injuries caused by a defect in a flight of steps leading to a basement room of a schoolhouse, used as a polling place, to a citizen who was going down the steps for the purpose of entering the room to vote. *McNeil v. Boston*, 326.

Liability of householder for injury caused by ice on sidewalk formed by a gutter maintained by him, see NUISANCE, 1, 2.

Assessments for laying out way must not exceed benefits, see CONSTITUTIONAL LAW, 7.

Lien for betterments attaches on laying out of way, see COVENANT, 2.

Record of county commissioners admitted to show character of way, see EVIDENCE, 13.

WESTMINSTER CHAMBERS.

Necessary parties to information concerning, see EQUITY PLEADING AND PRACTICE, 2.

See also CONSTITUTIONAL LAW, 5, 15.

WESTWOOD.

Setting off Westwood as a new town did not take it out of Metropolitan Parks District, see METROPOLITAN PARKS DISTRICT, 1.

WILL.

Execution.

A testatrix lay in bed in one room while two of the subscribing witnesses to a codicil to her will signed in another room on the opposite side of a narrow entry, the doors of both rooms being open. The witnesses sat at a table just inside the open door of their room, and the bed of the testatrix was in such a position that by rising slightly she could have seen the witnesses as they signed, but it did not appear whether or not she had the power thus to raise herself. Immediately after the signing by the witnesses, the codicil was shown to the testatrix. *Held*, that on these facts the witnesses could be found to have subscribed the codicil in the presence of the testatrix. *Raymond v. Wagner*, 315.

For cases on construction of wills, see DEVISE AND LEGACY.

Construction of a devise for life with power to sell and as to what is proper execution of such power, see DEVISE AND LEGACY, 6.

Testator's bequest of his invalid note good as a pecuniary legacy, see DEVISE AND LEGACY, 5.

Burden of proving divesting of vested interest under, see EVIDENCE, 1.

Evidence to show good faith in execution of power, see EVIDENCE, 5.

WITNESS.

Cross-examination.

In an action by an indorsee of a promissory note against the maker, the defendant undertook to show that the note was without consideration as between the maker and the payee and that the plaintiff took it from the payee after maturity. The payee and indorser of the note who was a brother of the maker appeared as a witness for the defendant. In the course of his cross-examination the plaintiff's counsel produced a paper, showed it to the witness, and asked the question: "Will you swear that is not a copy of the entry from your own journal?" The witness answered "Well, I have n't my journal. I can't swear to copies of entries in my journal." The cross-examining counsel then put the question: "If your journal contains this entry: Bank of England, September 12, 1896, two hundred pound and six hundred and six pounds, ten shillings, eleven

pence, paid A. Gordon, to go against which is the note of \$3,871.42, payable in any bank in Massachusetts, — don't you suppose there was a transaction behind it?" and the witness answered "I cannot swear anything about my journal." The paper was not put in evidence. *Held*, that the foregoing question was a natural and legitimate step in the cross-examination, and that it did not assume or imply that there was such an entry, and that it was competent for the jury to consider the answer of the witness on the question of his credibility. *Boston Rubber Shoe Co. v. Gordon*, 520.

Reference to written instrument on cross-examination to affect credibility of witness, see EVIDENCE, 15.

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